

10-17-2008

Barcella v. State Clerk's Record v. 1 Dckt. 35502

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Vol. 1 9

IN THE SUPREME COURT

LAW CLERK
OF THE STATE OF IDAHO

GERALD A. BARCELLA

Petitioner/Appellant

v.

STATE OF IDAHO

Respondent

CLERK'S RECORDS ON APPEAL
FROM THE DISTRICT COURT OF FIRST
JUDICIAL DISTRICT OF IDAHO,
IN AND FOR THE COUNTY
OF KOOTENAI

ATTORNEY FOR PETITIONER/APPELLANT

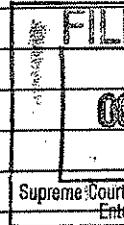
Molly Huskey

ATTORNEY FOR RESPONDENT

Lawrence Wasden

SUPREME COURT CASE #35502

VOLUME I



IN THE SUPRMEME COURT FOR THE STATE OF IDAHO

Gerald Angelo Barcella

v.

State of Idaho

Civil Case # CV01-5504

Supreme Court Case #35502

CLERK'S CERTIFICATE ON APPEAL

Appeal from the District Court of the First Judicial District of the State of Idaho, in and for the County of Kootenai.

HONORABLE JOHN PATRICK LUSTER PRESIDING
District Judge

Attorney for Appellant

Molly J. Huskey
3647 Lake Harbor Dr.
Boise, ID 83703

Attorney for Respondent

Lawrence G. Wasden
P.O. Box 83720
Boise, ID 83720

Date: 8/20/2008

First Judicial District Court - Kootenai County

User: MCCORD

Time: 12:01 PM

ROA Report

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Case: CV-2001-0005504 Current Judge: John P. Luster
Gerald Angelo Barcella, Plaintiff vs State Of Idaho, Defendant

Gerald Angelo Barcella, Plaintiff vs State Of Idaho, Defendant

| Date | Code | User | | Judge |
|------------|------|-----------|--|----------------|
| 8/24/2001 | NEWC | JANUSCH | New Case Filed | District Clerk |
| | | JANUSCH | Filing: 9SPC - Post Conviction Relief Filing Paid by: state Receipt number: 0502025 Dated: 09/10/2001 Amount: \$.00 (Cash) | John P. Luster |
| | AFFD | JANUSCH | Affidavit OF Gerald Barcella | District Clerk |
| | MOTN | JANUSCH | Motion for leave to Proceed in Forma Pauperius | District Clerk |
| | MOTN | JANUSCH | Motion for Appointment of Conflicts Counsel | District Clerk |
| 9/10/2001 | | JANUSCH | Order Appointing Public Defender Entered | District Clerk |
| | ORDR | JANUSCH | Re Petition for Waiver of costs & fees | District Clerk |
| | ORDR | JANUSCH | Order Appointing Public Defender | District Clerk |
| 9/11/2001 | FILE | JANUSCH | Files 1,2 & 3 in expando File 4 on shelf | District Clerk |
| 10/16/2001 | ANSW | BEVERIDG | Respondents Answer to Petition for Post-Conviction Relief | District Clerk |
| | MOTN | BEVERIDG | State's Motion for Summary Disposition | District Clerk |
| 4/15/2002 | NOPD | DUBE | Notice Of Proposed Dismissal Issued | District Clerk |
| 4/23/2002 | AFFD | BOOTH | Affidavit of John M. Adams in Response to Notice of Proposed Dismissal | District Clerk |
| 5/3/2002 | IOPR | MEYER | Inactivity Order Printed - File Sent to Judge | District Clerk |
| 5/9/2002 | REVR | BOOTH | Reviewed And Retained | District Clerk |
| 8/22/2002 | ADMR | JANUSCH | Administrative assignment of Judge | John P. Luster |
| 10/11/2002 | MOTN | PARKER | States Motion for Summary Disposition Dismissal | John P. Luster |
| 10/22/2002 | HRSC | WATKINS | Hearing Scheduled (Status Conference 01/28/2003 03:30 PM) | John P. Luster |
| | HRSC | WATKINS | Hearing Scheduled (Status Conference 12/12/2002 03:30 PM) | John P. Luster |
| 10/23/2002 | NOAP | LEITZKE | Notice Of Appearance | John P. Luster |
| | MISC | LEITZKE | Objection to State's Motion to Dismiss | John P. Luster |
| 10/25/2002 | SUBC | LEITZKE | Substitution Of Counsel | John P. Luster |
| 12/11/2002 | MOTN | SATERFIEL | Motion for Hearing by Teleconference | John P. Luster |
| 12/12/2002 | INHD | BOOTH | Hearing result for Status Conference held on 12/12/2002 03:30 PM: Interim Hearing Held | John P. Luster |
| | HRSC | BOOTH | Hearing Scheduled (Status Conference 02/27/2003 03:30 PM) | John P. Luster |
| 2/27/2003 | INHD | BOOTH | Hearing result for Status Conference held on 02/27/2003 03:30 PM: Interim Hearing Held | John P. Luster |
| 3/17/2003 | ORDR | BOOTH | Order scheduling order | John P. Luster |
| 7/21/2003 | MNET | NORIEGA | Motion For Extension Of Time For Final Amended Petition | John P. Luster |
| 1/20/2004 | NOPD | DUBE | Notice Of Proposed Dismissal Issued | John P. Luster |
| 2/6/2004 | MISC | BOOTH | Petitioners response to Rule 40(c) notice | John P. Luster |

Date: 8/20/2008

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Case: CV-2001-0005504 Current Judge: John P. Luster

Gerald Angelo Barcella, Plaintiff vs State Of Idaho, Defendant

Gerald Angelo Barcella, Plaintiff vs State Of Idaho, Defendant

| Date | Code | User | | Judge |
|------------|------|----------|---|----------------|
| 2/6/2004 | AFFD | BOOTH | Affidavit of Rolf Kehne in support of Petitioners Response to Rule 40(c) Notice | John P. Luster |
| 2/9/2004 | IOPR | MEYER | Inactivity Order Printed - File Sent to Judge | John P. Luster |
| 2/23/2004 | REVR | BOOTH | Reviewed And Retained | John P. Luster |
| 2/26/2004 | MOTN | VICTORIN | State's Motion for Summary Judgment | John P. Luster |
| 3/2/2004 | HRSC | BOOTH | Hearing Scheduled (Status Conference 04/12/2004 03:30 PM) | John P. Luster |
| | MISC | BOOTH | #### DENIED #### order for summary judgment | John P. Luster |
| 3/15/2004 | MOTN | BOOTH | Motion for telephone hearing | John P. Luster |
| 3/22/2004 | LETR | BOOTH | Letter from defendant to court | John P. Luster |
| 4/12/2004 | INHD | BOOTH | Hearing result for Status Conference held on 04/12/2004 03:30 PM: Interim Hearing Held | John P. Luster |
| 4/20/2004 | HRSC | BOOTH | Hearing Scheduled (Court Trial Scheduled 04/04/2005 09:00 AM) | John P. Luster |
| 9/15/2004 | HRSC | BOOTH | Hearing Scheduled (Status Conference 09/27/2004 03:30 PM) | John P. Luster |
| 9/27/2004 | INHD | BOOTH | Hearing result for Status Conference held on 09/27/2004 03:30 PM: Interim Hearing Held | John P. Luster |
| | HRVC | BOOTH | Hearing result for Court Trial Scheduled held on 04/04/2005 09:00 AM: Hearing Vacated | John P. Luster |
| 9/29/2004 | LETR | BOOTH | Letter - from Plaintiff re: PA | John P. Luster |
| 10/12/2004 | ORDR | BOOTH | on conference post-conviction relief | John P. Luster |
| 11/1/2004 | MOTN | SWIGART | Motion to Vacate Counsel and Reappoint new Conflict Counsel to Barcella as Co-Counsel | John P. Luster |
| | AFFD | SWIGART | Affidavit in Support of Motion to Vacate Cousnel and Reappoint New Conflict Counsel as CoCounsel to Barcella | John P. Luster |
| 12/30/2004 | FILE | ROBINSON | New File Created # 5of 5 | John P. Luster |
| 6/28/2005 | NOTE | MEYER | File with the Judge since January. | John P. Luster |
| 8/22/2005 | ORDR | WATKINS | Order Terminating Representation By Counsel Rolf Kehne and Directing Public Defender To New Counsel | John P. Luster |
| 8/31/2005 | SUBC | GLASS | Substitution Of Counsel Michael Palmer | John P. Luster |
| 9/15/2005 | | BARKER | Miscellaneous Payment: For Making Copy Of Any File Or Record By The Clerk, Per Page Paid by: Gerald Barcella Receipt number: 0667160 Dated: 09/15/2005 Amount: \$2.00 (Check) | John P. Luster |
| | HRSC | BOOTH | Hearing Scheduled (Status Conference 11/22/2005 03:30 PM) | John P. Luster |
| | | BOOTH | Notice of Hearing | John P. Luster |
| | | BOOTH | Notice of Hearing | John P. Luster |
| 11/2/2005 | HRSC | BOOTH | Hearing Scheduled (Motion for Summary Judgment 08/17/2006 03:30 PM) | John P. Luster |

Date: 8/20/2008

First Judicial District Court - Kootenai County

User: MCCORD

Time: 12:01 PM

ROA Report

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Gerald Angelo Barcella, Plaintiff vs State Of Idaho, Defendant

Gerald Angelo Barcella, Plaintiff vs State Of Idaho, Defendant

| Date | Code | User | | Judge |
|------------|------|-----------|--|----------------|
| 11/4/2005 | NOTH | PARKER | Notice Of Hearing | John P. Luster |
| 11/22/2005 | INHD | WATKINS | Hearing result for Status Conference held on 11/22/2005 03:30 PM: Interim Hearing Held | John P. Luster |
| 11/25/2005 | HRSC | WATKINS | Hearing Scheduled (Status Conference 03/02/2006 03:30 PM) | John P. Luster |
| | | WATKINS | Notice of Hearing | John P. Luster |
| | | WATKINS | Notice of Trial | John P. Luster |
| 12/8/2005 | ORDR | BOOTH | Order (from 11/22/5 hearing) | John P. Luster |
| 1/10/2006 | LETR | ROBINSON | Letter To Judge Luster Reviwed 1-10-06 attached to none acco side | John P. Luster |
| 2/28/2006 | NOTC | BROOK | Notice OF INTENT28 FEB 06 | John P. Luster |
| 3/1/2006 | MNWD | BROOK | Motion For Leave To Withdraw As Attorney | John P. Luster |
| | INHD | BOOTH | Hearing result for Status Conference held on 03/02/2006 03:30 PM: Interim Hearing Held | John P. Luster |
| 3/2/2006 | HRSC | BOOTH | Hearing Scheduled (Evidentiary Hearing 04/09/2007 09:00 AM) 5 Days | John P. Luster |
| | | BOOTH | Notice of Hearing | John P. Luster |
| | ORDR | BOOTH | Order on Status conference | John P. Luster |
| 3/9/2006 | MISC | LEITZKE | Amended Petition For Post-Conviction Relief Pursuant to ICR 57 | John P. Luster |
| 3/15/2006 | HRSC | WATKINS | Hearing Scheduled (Motion to Withdraw 04/11/2006 03:30 PM) | John P. Luster |
| 3/16/2006 | NOHG | MCCOY | Notice Of Hearing | John P. Luster |
| 3/24/2006 | ANSW | VICTORIN | Respondent's Answer to Amended Petition for Post-Conviction Relief | John P. Luster |
| 4/5/2006 | MOTN | MO'REILLY | State's Amended Motion For Summary Disposition | John P. Luster |
| 4/11/2006 | DENY | WATKINS | Hearing result for Motion to Withdraw held on 04/11/2006 03:30 PM: Motion Denied | John P. Luster |
| 4/18/2006 | HRVC | BOOTH | Hearing result for Motion for Summary Judgment held on 08/17/2006 03:30 PM: Hearing Vacated | John P. Luster |
| | HRSC | BOOTH | Hearing Scheduled (Motion for Summary Judgment 08/23/2006 03:30 PM) | John P. Luster |
| 4/25/2006 | NOHG | MO'REILLY | Notice Of Hearing | John P. Luster |
| 8/22/2006 | LETR | BOOTH | Letter from Petitioner requesting new attorney | John P. Luster |
| 8/23/2006 | INHD | BOOTH | Hearing result for Motion for Summary Judgment held on 08/23/2006 03:30 PM: Interim Hearing Held | John P. Luster |
| | CONT | BOOTH | Hearing result for Motion for Summary Judgment held on 08/23/2006 03:30 PM: Continued | John P. Luster |
| | HRSC | BOOTH | Hearing Scheduled (Motion for Summary Judgment 01/09/2007 03:30 PM) | John P. Luster |
| 8/25/2006 | NOHG | OLSON | Notice Of Hearing | John P. Luster |

Date: 8/20/2008

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User: MCCORD

Time: 12:01 PM

ROA Report

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 Gerald Angelo Barcella, Plaintiff vs State Of Idaho, Defendant

Gerald Angelo Barcella, Plaintiff vs State Of Idaho, Defendant

| Date | Code | User | | Judge |
|------------|------|----------|---|----------------|
| 8/30/2006 | NOHG | VICTORIN | Notice Of Hearing | John P. Luster |
| 1/9/2007 | HRHD | WATKINS | Hearing result for Motion for Summary Judgment held on 01/09/2007 03:30 PM: Hearing Held | John P. Luster |
| 1/23/2007 | AFFD | REMPFER | Affidavit of Gabriel Caballero | John P. Luster |
| 1/25/2007 | ORDR | BOOTH | Order on summary dismissal | John P. Luster |
| 2/2/2007 | AFFD | REMPFER | Affidavit of Frank Morin | John P. Luster |
| 2/5/2007 | AFFD | REMPFER | Affidavit of Franklin Green | John P. Luster |
| 3/6/2007 | MOTN | VICTORIN | Motion to Transport Petitioner | John P. Luster |
| 3/9/2007 | ORDR | BOOTH | Order to Transport Petitioner | John P. Luster |
| 4/6/2007 | MNCN | WATKINS | Motion To Continue Evidentiary Hearing | John P. Luster |
| 4/9/2007 | CONT | BOOTH | Hearing result for Evidentiary Hearing held on 04/09/2007 09:00 AM: Continued 5 Days | John P. Luster |
| 4/13/2007 | HRSC | BOOTH | Hearing Scheduled (Evidentiary Hearing 05/29/2007 09:00 AM) 5 days | John P. Luster |
| | HRSC | BOOTH | Hearing Scheduled (Pre-Trial Conference 05/18/2007 09:30 AM) | John P. Luster |
| | ORDR | BOOTH | Order continuing evidentiary hearing | John P. Luster |
| 4/26/2007 | AFFD | REMPFER | Affidavit of Michael G Palmer | John P. Luster |
| | MOTN | VICTORIN | Motion to Appear Via Telephone at Hearing | John P. Luster |
| 4/27/2007 | NOHG | VICTORIN | Notice Of Hearing | John P. Luster |
| 5/18/2007 | INHD | BOOTH | Hearing result for Pre-Trial Conference held on 05/18/2007 09:30 AM: Interim Hearing Held | John P. Luster |
| 5/25/2007 | SUBF | HUFFMAN | Subpoena Return/found Post Conv | John P. Luster |
| 5/30/2007 | INHD | BOOTH | Hearing result for Evidentiary Hearing held on 05/29/2007 09:00 AM: Interim Hearing Held 5 days - Court reporter Betty Sitter | John P. Luster |
| | INHD | BOOTH | Interim Hearing Held - Day 2 Post Conviction Relief hearing - Betty Sitter Court reporter am-Bryl Cinnamon Court Reporter PM | John P. Luster |
| 6/4/2007 | MOTN | VICTORIN | Motion for Preparation of Transcript | John P. Luster |
| 6/5/2007 | ORDR | BOOTH | Order setting briefing schedule | John P. Luster |
| | ORDR | BOOTH | Order for preparation of transcript | John P. Luster |
| 6/8/2007 | ORDR | BOOTH | Order to transport petitioner back to ICI | John P. Luster |
| 6/11/2007 | ORDR | BOOTH | Order for preparation of transcript | John P. Luster |
| 11/21/2007 | | MCCORD | Miscellaneous Payment: For Making Copy Of Any File Or Record By The Clerk, Per Page Paid by: Gerald Barcella Receipt number: 0771414 Dated: 11/21/2007 Amount: \$2.00 (Check) | John P. Luster |
| 12/6/2007 | NOTC | BOOTH | Notice of Lodging of Transcript (Betty Sitter) | John P. Luster |
| 2/19/2008 | STIP | VICTORIN | Stipulation to Extend Briefing Deadlines | John P. Luster |
| 2/29/2008 | BRIE | LSMITH | Brief in support of petition for post-conviction relief & amended petition for post-conviction relief | John P. Luster |

Date: 8/20/2008

First Judicial District Court - Kootenai County

User: MCCORD

Time: 12:01 PM

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Case: CV-2001-0005504 Current Judge: John P. Luster
Gerald Angelo Barcella, Plaintiff vs State Of Idaho, Defendant

Gerald Angelo Barcella, Plaintiff vs State Of Idaho, Defendant

| Date | Code | User | | Judge |
|-----------|------|----------|--|----------------|
| 3/4/2008 | ORDR | BOOTH | Order re: stipulation to extend briefing deadlines | John P. Luster |
| 3/28/2008 | BRIE | PARKER | Brief in Opposition to Amended Petition for Post Conviction Relief | John P. Luster |
| 4/24/2008 | BRIE | BAXLEY | Brief in Response to Brief in Opposition to Amended petition for Post-Conviction Relief | John P. Luster |
| 6/25/2008 | DEOP | BOOTH | Decision On Petition for Post-Conviction Relief | John P. Luster |
| 7/3/2008 | AFFD | CANTU | Affidavit of Michael G. Palmer in Support of Defendant's Motion to Appoint State Appellate Public Defender | John P. Luster |
| | MOTN | LSMITH | Motion to Appoint State Appellate Public Defender | John P. Luster |
| | APDC | LSMITH | Appeal Filed In District Court | John P. Luster |
| | NOTC | LSMITH | Notice of Appeal | John P. Luster |
| 7/15/2008 | ORDR | BOOTH | Order for appointment of state appellate public defender | John P. Luster |
| 7/22/2008 | NOTC | LSMITH | Amended Notice of Appeal | John P. Luster |
| 7/30/2008 | ORDR | BOOTH | Order to prepare transcript | John P. Luster |
| 7/31/2008 | NLTR | ROBINSON | Notice of Lodging Transcript Betty Sitter 5-29-2007 5-30-2007 | John P. Luster |
| 8/4/2008 | NLTR | CANTU | Notice of Lodging Transcript 08/04/08 | John P. Luster |

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| CLERK'S CERTIFICATE ON APPEAL | a |
| PETITION FOR POST CONVICTION RELIEF | |
| Filed August 24, 2001 | VOLUME I |
| AFFIDAVIT OF GERALD BARCELLA | |
| Filed August 24, 2001 | VOLUME II |
| MOTION FOR LEAVE TO PROCEED <i>IN FORMA PAUPERIS</i> | |
| Filed August 24, 2001 | 580 |
| MOTION FOR APPOINTMENT OF CONFLICTS' COUNSEL | |
| Filed August 24, 2001 | 584 |
| ORDER APPOINTING PUBLIC DEFENDER | |
| Filed September 10, 2001 | 588 |
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| Filed October 2, 2007 | 589 |
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| Filed October 11, 2002 | 595 |
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| Filed October 23, 2002 | 596 |
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| Filed October 23, 2002 | 598 |
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| Filed October 25, 2002 | 602 |
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Filed November 1, 2004.....742

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Filed August 22, 2005745

SUBSTITUTION OF COUNSEL

Filed August 31, 2005748

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Filed February 28, 2006751

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Filed March 9, 2006757

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Filed March 24, 2006762

STATE'S AMENDED MOTION FOR SUMMARY DISPOSITION

Filed April 5, 2006764

LETTER TO JUDGE FROM PETITIONER

Filed August 22, 2006766

AFFIDAVIT OF GABRIEL CABALLERO

Filed January 23, 2007768

ORDER RE. SUMMARY DISMISSAL

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Filed February 2, 2007772

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| Filed July 3, 2008..... | 834 |
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| SUBSTITUTION OF COUNSEL Filed October 25, 2002 | 602 |

Gerald A. Barcella # 56305
ICI-O; A-Block
Hospital North Drive # 23
Orofino, Idaho 83544

Petitioner in Pro Se

7-14 AM '01
[Signature]
DEPUTY

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

Case No. CV 01-5504

GERALD A. BARCELLA,)
Petitioner,)
)
vs.)
)
STATE OF IDAHO,)
Respondent.)
)

PETITION FOR POST CONVICTION
RELIEF

COMES NOW, the Petitioner Gearld A. Barcella in pro se
and pursuant to Idaho Code § 19-4901 et. seq. hereby seeks relief
for the reasons and upon the grounds as set forth herein and
further based upon the files and records of this Court.

1. Petitioner was charged and convicted by a jury of his
peers of First Degree Murder and a deadly weapons' enhancement
on or about December 17, 1997 in the above Court.

2. During the course of the trial the Honorable John H.
Bengsten presided.

3. On or about, November 10, 1998 a sentence of thirty

(30) years to life was imposed by the Honorable Bengsten for the crime of First Degree Murder. *Case no. CRF 96-03185*

4. An appeal was taken on December 16, 1998 and appellate counsel, Molly Huskey was appointed to represent the Petitioner.

5. On September 18, 2000 the appeal was denied by the Idaho Court of Appeals and Petitioner sought review which was denied by the Idaho Supreme Court on or about January 17, 2001.

6. Petitioner seeks relief pursuant to I.C. § 19-4901 et. seq. in that the convictions and/or sentence was in violation of the Constitution of the United States and the laws of the state of Idaho.

7. Petitioner seeks relief pursuant to I.C. § 19-4901 in that there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interests of justice.

8. Petitioner seeks relief pursuant to I.C. § 19-4901 et. seq. in that the conviction and sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under any common law, statutory, or other writ, motion, petition, proceeding or remedy.

9. Petitioner hereby reserves the right to amend this petition in the event that such is necessary.

10. Petitioner further requests that he be appointed "conflicts' attorney" in that this petition is partially based upon the allegations of ineffective assistance of counsel at trial and upon appeal.

11. The factual allegations of this petition are hereto attached and incorporated as if part of this typed petition.

Dated this 6TH day of August, 2001.

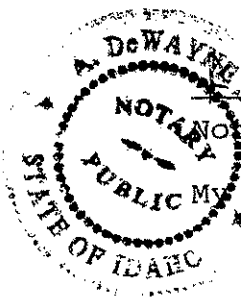
Gerald A. Barcella
Gerald A. Barcella, Petitioner

V E R I F I C A T I O N

I HEREBY CERTIFY THAT, I have read the petition and attached allegations and know the contents to be true and correct based upon my own personal knowledge and belief.

Subscribed to and Sworn before me this
6TH day of August, 2001.

Gerald A. Barcella
Gerald A. Barcella, Petitioner



A. DeWayne Shultz
Notary Public for Idaho
My Commission Expires:

11 / 06 / 01
month day year

Residing at 172, Idaho.



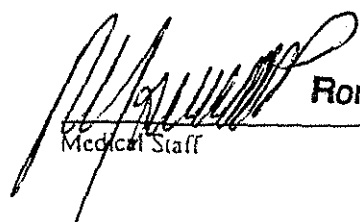
Idaho Department of Correction
Correctional Medical Services

OFFENDER MEDICAL STATUS REPORT

NAME Barcello, Donald DOC # 56305 DATE 10/3/00

This report indicates current medical status, changes, and / or updates regarding the above named offender and supersedes all previous Medical Status Reports

| STATUS CATEGORY | ADD | DELETE | REMARKS | EXPIRATION DATE |
|------------------------|----------------|--------|---------|-----------------|
| Recreation Restriction | | | | |
| Medical Lay In | | | | |
| Medical Idle | | | | |
| Lower Bunk | <u>10/3/00</u> | | | <u>10/3/01</u> |
| Work Limitation | | | | |
| Meals in Tier/Unit | | | | |
| Cotton Blankets | | | | |
| Ice Memo | | | | |
| Medical Hold | | | | |
| Food Handling | | | | |
| Special Diet | | | | |
| Shaving | | | | |
| Other: | | | | |


Rory York, M.R.N.P.
Medical Staff

cc. Unit A3 Food Services
Unit Sergeant Laundry
Inmate Social Worker
Recreation Control
DW Security



Idaho State Bar

525 West Jefferson P. O. Box 895 Boise, Idaho 83701 PH: (208) 334-4500 FAX: (208) 334-4515

OFFICE OF BAR COUNSEL

Michael J. Oths
Bar Counsel

Julia A. Crossland
Assistant Bar Counsel

Christina R. Awadalla
Investigator

C. A. "Connie" Wold
Investigator

Sue Nelson
Administrative Assistant

Julie D. Owsley
Administrative Assistant

April 18, 2001

PERSONAL AND CONFIDENTIAL

Gerald Barcella
#56305, ICI-O
Unit A-3-245-A
Hospital North Dr. #23
Orofino, ID 83544

RE: Complaint vs. Molly Huskey
ISB File No. 01-C144W

Dear Mr. Barcella:

This is to acknowledge receipt of your recent correspondence to the Idaho State Bar. An investigator and Bar Counsel will review your grievance. Normally, we will be back in contact with you within 45 to 60 days. If additional information or investigation is needed, the review may take longer. Our office will keep you informed about the progress of our investigation or provide you with a written determination in your case.

Please note that the investigation of a grievance is confidential by rule of the Idaho Supreme Court. This means that you should maintain confidentiality about the fact that you have filed a complaint with our office (except to discuss it with your current lawyer.) This is not a prohibition about discussing the underlying facts - we only ask that you communicate about the grievance itself through this office.

Any legal remedies you may have must continue to be pursued by you through the proper legal channels. This office cannot give legal advice. Do not wait for us to complete our investigation before pursuing any private legal remedies you may have. The Idaho State Bar Lawyer Referral Service may be able to assist you to locate an attorney. The phone number is 334-4500, and the cost is not over \$35 for the first half hour consultation.

If you have any questions regarding your grievance, please contact Mr. C. A. Wold in Bar Counsel's Office.

Sincerely,

Julie D. Owsley
Administrative Assistant

:jdo

005

JAMES F. JUDD

DISTRICT JUDGE

First Judicial District
State of Idaho

Charlotte Crouch
Court Reporter

Merri Thorne
Clerk/Secretary

Patrick M. Braden
Law Clerk

Resident Chambers
Kootenai County Courthouse
501 Government Way
Coeur d'Alene, Idaho 83816-0999

Telephone
(208) 769-4431

Facsimile
(208) 664-9370

April 12, 2001

Gerald Barcella #56305
ICI-O; Unit A-3-245-A
Hospital North Drive #23
Orofino, ID 83544

Re: Post-conviction in some case in the 1st Judicial
District

Dear Mr. Barcella:

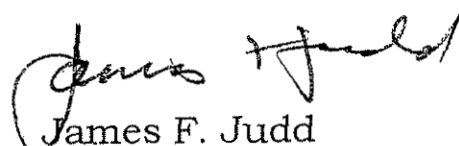
I am forwarding a copy of your letter to Ms. Husky. Your complaints against her should be addressed to her, her supervisor, Ron Coulter, or to the Idaho State Bar. Their addresses are:

Molly J. Husky
SAPD
3380 Americana Terrace Ste. 360
Boise, ID 83706

Ronaldo A. Coulter
SAPD
3380 Americana Terrace Ste. 360
Boise, ID 83706

Idaho State Bar
P.O. Box 895
Boise, ID 83701

Very truly yours,


James F. Judd
District Judge

cc: Molly J. Husky w/enc
Court File

(C O P Y)

Gerald Barcella # 56305
ICI-O; Unit A-3-245-A
Hospital North Drive # 23
Orofino, Idaho 83544

April 2, 2001

Ms. Molly Husky
Idaho State Appellate Public Defender
3380 Americana Terrace, 3rd Floor
Suite # 360
Boise, Idaho 83701

Dear Molly,

Once again, I am writing you to get my preliminary trial and trial discovery transcripts, evidence, etc.

I am deeply concerned that you have not forwarded such despite several phone conversations in which you stated you have sent such. I also sent you a formal letter. If I don't receive the requested material in 10 days I will be forced to contact the Idaho Bar Association, the ACLU and get a court order to force you to give me my papers. I cannot file for post-conviction relief or an attorney until I have proof to present to the court for an evidentiary hearing. So far, I've lost 2 months of my 12 month time allotment to file the state Uniform Post Conviction Relief and Federal Habeas Corpus.

Please forward my papers A.S.A.P. as I am tired of being lied to.

Sincerely,

Gerald Barcella

cc: file

Date Rec'd APR 09 2001 Appt. Date _____ Time _____ Record # 412

IDAHO DEPARTMENT OF CORRECTIONS
ACCESS TO COURTS REQUEST

245

Name: G. Barcella IDOC #: 56305 Housing Assignment: A-3/245-F
Date Requested: _____

TYPE OF ACTION: I need _____ Form _____ Packet _____ Talk to paralegal

| | | |
|--|--|---|
| <input type="checkbox"/> Rule 35 | <input type="checkbox"/> Appeal | <input type="checkbox"/> Child Support |
| <input type="checkbox"/> Notary | <input type="checkbox"/> Notary | <input type="checkbox"/> Notary |
| <input type="checkbox"/> Photocopies | <input type="checkbox"/> Photocopies | <input type="checkbox"/> Photocopies |
| <input type="checkbox"/> Post Conviction | <input type="checkbox"/> Divorce | <input type="checkbox"/> Power of Attorney |
| <input type="checkbox"/> Notary | <input type="checkbox"/> Notary | <input type="checkbox"/> Notary |
| <input type="checkbox"/> Photocopies | <input type="checkbox"/> Photocopies | <input type="checkbox"/> Photocopies |
| <input type="checkbox"/> Civil Rights | <input type="checkbox"/> Habeas Corpus | <input type="checkbox"/> Tort Claim |
| <input type="checkbox"/> State | <input type="checkbox"/> State | <input type="checkbox"/> Photocopies |
| <input type="checkbox"/> Federal | <input type="checkbox"/> Federal | <input type="checkbox"/> Books to Check Out |
| <input type="checkbox"/> Notary | <input type="checkbox"/> Notary | _____ |
| <input type="checkbox"/> Photocopies | <input type="checkbox"/> Photocopies | _____ |

Filing deadlines/Court dates: 01-26-02 Post-Conviction
To get priority you must indicate the date/nature of any deadlines on every request. Proof of deadline required.

Briefly describe your issue: Atty Molly Husky, ID Appellate
Pub. Def. Office repeatedly stated my 6 boxes
or so of trial discovery, Attorney notes, transcript
were sent here. Can you call her at 208-334-2712
I do _____ do not _____ have an attorney in this action. shall be back 04-11-01 (we
by time is tolling!!!

I acknowledge that the IDOC Paralegal whose assistance I seek is not an attorney. The Paralegal cannot give legal advice as to the intent or effect of any document. Any such advice should be sought from a license attorney.

Gerald Barcella 04-08-01
Inmate Signature Date

~~DISAPPROVED~~ If disapproved, reason: WLC will call
to attempt to locate notes

A Delwape Sheld 4/9/01
Paralegal Date

008

ILLINOIS DEPARTMENT OF CORRECTIONS
ACCESS TO COURTS REQUEST

Name: Gerald Barcella IDOC #: 56305 Housing Assignment: A-3/245-A
Date Requested: 04-09-01

TYPE OF ACTION: I need _____ Form _____ Packet _____ Talk to paralegal _____

| | | |
|--|--|---|
| <input type="checkbox"/> Rule 35 | <input type="checkbox"/> Appeal | <input type="checkbox"/> Child Support |
| <input type="checkbox"/> Notary | <input type="checkbox"/> Notary | <input type="checkbox"/> Notary |
| <input type="checkbox"/> Photocopies | <input type="checkbox"/> Photocopies | <input type="checkbox"/> Photocopies |
| <input type="checkbox"/> Post Conviction | <input type="checkbox"/> Divorce | <input type="checkbox"/> Power of Attorney |
| <input type="checkbox"/> Notary | <input type="checkbox"/> Notary | <input type="checkbox"/> Notary |
| <input type="checkbox"/> Photocopies | <input type="checkbox"/> Photocopies | <input type="checkbox"/> Photocopies |
| <input type="checkbox"/> Civil Rights | <input type="checkbox"/> Habeas Corpus | <input type="checkbox"/> Tort Claim |
| <input type="checkbox"/> State | <input type="checkbox"/> State | <input type="checkbox"/> Photocopies |
| <input type="checkbox"/> Federal | <input type="checkbox"/> Federal | <input type="checkbox"/> Books to Check Out |
| <input type="checkbox"/> Notary | <input type="checkbox"/> Notary | _____ |
| <input type="checkbox"/> Photocopies | <input type="checkbox"/> Photocopies | _____ |

Filing deadlines/Court dates: 01-26-02
To get priority you must indicate the date/nature of any deadlines on every request. Proof of deadline required.

Briefly describe your issue: See attached Kite - Mrs Roan
refuses to accept my legal papers for my Postconvic
tion petition. This is discovery, transcripts, Attorney notes, etc
I need these to do my work. I have no attorney
I do _____ do not ☒ have an attorney in this action. what's up with this? I'm
sure other people here do post-conviction. what do we
I acknowledge that the IDOC Paralegal whose assistance I seek is not an attorney. The Paralegal cannot give do
legal advice as to the intent or effect of any document. Any such advice should be sought from a license
attorney.

Gerald Barcella 04-09-01
Inmate Signature Date

DISAPPROVED _____ If disapproved, reason: Plc will check on
Status. Also, you need to write your ~~Appellate~~
Appellate Public Defender and check on status



FIELD
MEMORANDUM

SECTION NUMBER:

III.316.03.1

PAGE NUMBER

5 of 5

SUBJECT:

ICI-O Offender
Grievance Process

adopted: 12/90
revised:

INMATE CONCERN AND INFORMAL RESOLUTION

Inmate Name: Gerald Barcella
Housing Block and Cell: A-3/245-A

Number: 56305
Date: 04-11-01

To: Mr Shedd - Resource Ctr.

Issue/Concern: Atty Molly Husky (ID Appellate Public Defender)
Today informed me that her boss Atty Ron Coulter called
here to ICIO to O.K. shipping my trial discovery transcripts,
etc so I can file my post-conviction petition. Atty
Coulter was told by Dep Warden McEckern (she thinks
it was him) that ICIO would not accept my legal work
and would send me somewhere else that had room to store it.
This is in violation of IDOC prison Directives and state and
Federal law. Any amount over 3 cubic feet is to be stored by you
and accessible to me when I need it. Furthermore I'm in P.C.
and being shipped to another institution is a violation of my
civil rights and even if I wasn't is retaliatory and against my civil
rights. I am doing a life sentence for murder. 3 months of my 12
month time limit have tolled already. Gerald Barcella
Signature
Can you help me?

Reply: Your Legal work is not refused by IDOC.
ICI-O has limited space to accomodate your legal work.

J. Delgado
Signature/Title

Date: 4/11/01

(C O P Y)

Gerald Barcella # 56305
ICI-0; Unit A-3
Hospital North Drive # 23
Orofino, Idaho 83544

March 5, 2001

Ms. Molly Husky
Idaho Appellate Public Defender
3380 Americana Terr.
Third Floor; Ste # 360
Boise, Idaho 83702

Re: State v. Barcella; Case No. CRF 96-03185

Dear Ms. Husky,

I am writing to ask that you forward my complete legal files to me so I can pursue my post conviction action which I must exhaust before going into federal court seeking habeas corpus relief.

Whereas you are no longer my attorney of record you should no longer have a need for these records and files and they would greatly assist me in the preparation of my petition not to mention save the taxpayers a lot of money.

The records sought include all discovery, legal files, briefs, reports, etc.

In closing I want to thank you for your help with my appeal and the efforts you made towards helping me as they are sincerely appreciated.

Respectfully Yours,

Gerald Barcella

cc: file

(C O P Y)

Gerald Barcella # 56305
ICI-O; Unit A-3-245-A
Hospital North Drive # 23
Orofino, Idaho 83544

April 9, 2001

Hon. James Judd
Administrative Judd
First District Court
Kootenai County Courthouse
324 W. Garden Ave.
Coeur d' Alene, Idaho 83816-9000

Re: Denial of Legal Files

Dear Judge Judd,

I am writing you to ask for your help and intervention.

I am wanting to file my post conviction petition and, as you are aware, have one year limitation to do this and, this limitation also comes into play for my federal habeas corpus action.

The problem is my appellate counsel of record, Ms. Molly Husky has failed and refused to forward all of my legal files and papers to me after I have made numerous requests by letter and phone and she has told me she would. Such files and papers include trial transcripts, discovery, attorney notes, etc. I want my complete records and files so I can adequately prepare and file my post conviction petition in the First District Court.

I realize that you're an administrative judge but, my petition will be filed in the First District Court and with Ms. Husky refusing to forward me my files when the appeal is over and she is no longer my attorney of record, does obstruct justice and denies me access to the court. Additionally, she has no further use of them and, it would save a considerable amount of taxpayer's money.

Ms. Husky is with the Idaho State Appellate Public Defender's Office.

Thank you for your help and understanding.

cc: file

Respectfully Yours,

Gerald Barcell

012

(C O P Y)

Gearld Barcella # 56305
ICI-O; Unit A-3-245-A
Hospital North Drive # 23
Orofino, Idaho 83544

April 9, 2001

Idaho State Bar
525 W. Jefferson
P.O. Box 895
Boise, Idaho 83701

C O M P L A I N T

I am writing to file a formal complaint with the Idaho State Bar against appellate public defender, Molly Husky.

Ms. Husky was appointed by the court to represent me on my criminal appeal. The appeal is over with and she is no longer my attorney of record. I have called her on numerous occasions and have written to her several times requesting all of my legal files including, but not limited to, discovery and attorney notes in State v. Barcella, CRF-96-03185 and my criminal appeal, Case Number 25216. Such requests were to include all trial transcripts as well.

I requested these files for the purpose of filing my post conviction petition which has a year's statute of limitation and, the federal habeas corpus statute, also a year which does not toll until after the petition is filed and then, it's only for how many months were left on the year. Please refer to statutory provisions.

My complaint is simple; Ms. Husky has lied to me and has failed and refused to provide me these records I am entitled to thereby obstructing justice and my access to the court.

Would you kindly order her to forward my files to me and take appropriate action against her for violation of ABA and State Bar rules and regulations ?

Thank you for your prompt response and understanding.

cc: file

Respectfully Yours,

Gerald Barcella

013

HO DEPARTMENT OF CORRECTION GRIEVANCE FORM

| | | | |
|--------------------------|------------------|----------------------------|-------------------|
| NAME: Gerald Barcella | NUMBER: 56305 | FACILITY/UNIT: IC10/A-3 | DATE: 03-26-01 |
|--------------------------|------------------|----------------------------|-------------------|

| | |
|-------------------------|----------------------------|
| FOR ADMINISTRATIVE USE | |
| Facility: IC10 | Date Answer Sent: |
| Date Received: 3-27-01 | Grievance Number: 03-02-7 |
| Date Answer Due: 4-5-01 | Grievance Category Code: 1 |

THE DECISION/ACTION THAT I AM GRIEVING IS:
Not allowed a small amount of time to get together with another inmate to do my Post-Conviction Relief

I HAVE TRIED TO SOLVE THIS INFORMALLY BY:
Concerns (3) 1) Sgt Christensen, 2) Lt Singleton, 3) Mr. Shedd and to D.W. Mac which was intercepted.

THE REASON WHY I FEEL IT SHOULD BE CHANGED IS:
due to no law library Federal law allows inmates to help each other with legal work. I only want 2 or 3 hours per week with inmate Goodrich to do Post-Conviction. I have a very complicated case. Goodrich also has a Court order allowing him to help others. Being forced to move in together is retaliatory. We do not want to live together our unit is locked-down. P.C. OFFENDER'S SIGNATURE Gerald Barcella

THE RESPONSE FROM THE STAFF MEMBER BEING GRIEVED OR IN CHARGE OF THE AREA/OPERATION BEING GRIEVED:
The proposal offered by Sgt. Christensen is not retaliatory. It is offering a solution to your request. As protective custody status only one cell is allowed out at a time without staff supervision being directly on the floor. Your walk times are different. To provide day room use not during your walk time will interfere with others walk time. On capital cases attorneys are provided. Your 'status' limits both of us in what we can make available.

STAFF'S SIGNATURE: Billie DA

YOUR GRIEVANCE HAS BEEN REVIEWED AND I FIND:

- ① you are in restrictive housing per policy
- ② The offer to move you with Goodrich was a good faith effort to accommodate you.
- ③ Until you refuse to general population I will be obligated to get help from other inmates because you refuse the only access we can offer you in P.C.

SIGNATURE: pye DATE: 03-27-01 ☐ GRANTED ☒ DENIED ☐ MODIFIED

YOUR APPEAL HAS BEEN REVIEWED AND I FIND:

SIGNATURE: _____ DATE: _____

☐ WARDEN ☐ P&P ADMINISTRATOR
☐ GRANTED ☐ DENIED ☐ MODIFIED



FIELD MEMORANDUM

SECTION NUMBER:

III.316.03.1

PAGE NUMBER

5 of 5

SUBJECT:

ICI-O Offender
Grievance Process

adopted: 12/90
revised:

INMATE CONCERN AND INFORMAL RESOLUTION

Inmate Name:

Ronald Barcella

Number:

56305

Housing Block and Cell:

A-3/245-A

Date:

03-14-01

To:

~~Don Mac~~ Sgt. Christensen

Issue/Concern:

I would like to get together with another inmate to have him help me do my post-conviction relief. I have a very complicated case so need to review a lot of material (18 cubic feet approx.) I have no Atty - and have a capital case. I have never done a post-conviction before! We are on 22 hour lockdown. I would like to have a few hours a week with inmate Goodrich to do my post-conviction relief. Can we help me? We are allowed by Federal law to help each other do legal work. Thank you for your time.

Ronald Barcella

Signature

Reply:

IF YOU AND INMATE GOODRICH WANT TO BE ROOM MATES SEND ME A MAINE KEYS. I DONT SEE ANY WAY THAT WE WILL ALLOW 18 CUBIC FEET OF PAPER IN ANYONE'S CELL FOR VERY OBVIOUS SAFETY REASONS.

Sgt. Christensen

Signature/Title

Date:

3/20/01



FIELD MEMORANDUM

SECTION NUMBER:

III.316.03.1

PAGE NUMBER

5 of 5

SUBJECT:

ICI-O Offender
Grievance Process

adopted: 12/90
revised:

245

INMATE CONCERN AND INFORMAL RESOLUTION

Inmate Name: Gerald Barcella

Number: 56305

Housing Block and Cell: A-3 / 245-A

Date: 03-08-01

To: Mr Shedd - Resource Center

Issue/Concern: See attached concern from Lt. Singleton concerning 1 hour 3x per week for me and inmate Dan Goodrich #13304 getting together to do my Post-conviction relief. As you know Federal law (9th Circuit) allows inmates to have other inmates help us with such motions due to lack of law library. Inmate Goodrich also has a court order saying he will NOT be prevented from helping others. We are on 22 hour lockdown. Please see that we can get a few hours together per week to work on my Post-conviction. I have a capital case - murder I. Your help would be appreciated. My case is very complicated. Thank you.

Gerald Barcella


Signature

Reply: According to 02-405. Inmates may assist each other on their own, but may not be in possession of each other's legal materials.

W. Wayne Shedd

Signature/Title

Date: 3/9/01

| | | | |
|--|-----------------------------|--|-----------------------|
| <div>DEPARTMENT OF CORRECTIONS</div> <div></div> | FIELD MEMORANDUM | SECTION NUMBER: III.316.03.1 | PAGE NUMBER 5 of 5 |
| | | SUBJECT: adopted: 12/90 revised: | |
| | | ICI-O Offender Grievance Process | |

INMATE CONCERN AND INFORMAL RESOLUTION

Inmate Name: Gerald Barcella Number: 56305
Housing Block and Cell: A-3/245-A Date: 03-02-01

To: LT. Singleton

Issue/Concern: I am starting my state
Post Conviction Relief. I need help doing
this and Federal law 9th circuit allows us
to have another inmate help us. I would like
to have inmate Goodrick from my unit help
me. He has a court order allowing him to help
other inmates with litigation. Can you set up a
time a few times a week on some shift where
we can get together in the day room for this
purpose. Right now inmate Peña is given 5 hours per
night dayroom. The rest of us only get 1 hour
between 7am-7pm. I am not out when Goodrick is and
daytime slots are all taken.
Gerald Barcella
I really need help with this. Signature
Can you help me out?

Reply: MR BARCELLA, I BELIEVE YOU SHOULD DIRECT
THIS ISSUE TO MR. SHEED AT THE RESOURCE CENTER.

LT. Singleton
Signature/Title
Date: 3-5-01

Petitioner requests a

Conformed copy

sworn this _____ day of _____, 2001

X

Gerald A Barcella,
petitioner

On or about 07-01-01 and
07-21-01 Atty Molly said she
would send affidavit concerning
IDOC refusal to accept Barcella's
legal work but Barcella hasn't
received it as of date of mailing
this petition

Gerald Barcella

Gerald Barcella

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| 8-11 | Request For New Trial, mistrial, Acquittal or lesser conviction of manslaughter (Post-conviction Relief) |
| 12-15 | Cover sheetg Table of Contents Appellants Brief 07-26-99 |
| 16-19 | Statement of case - Appellants Brief 07-26-99 |
| 20-39 | Reply to Barcellas Appeal by Appellate Court 09-18-00 |
| 40-47 | Ineffective assistance of Counsel Appellate Counsel |
| 48-62 | Defendants Motion For New Trial / Motion For Judgement of Acquittal transcripts CRF 96-03185 |
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71 A Manifest Injustice Occurred

72-74 Access To Courts, Due Process, and
Effective Assistance of Counsel violations

75 New Evidence

76-78 Sentence was decided on through
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record and prior bad acts that were
materially untrue

79-127 Prosecutorial Misconduct

128-145 Judges' Decisions and Conduct at trial
were so bad as to deprive defendant of a
fair trial

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Before trial and during pretrial motions were
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167-179 The jury found Mr. Barcella guilty through the false and perjured testimony of Rikki Bobo

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189-191 The Jury Found Gerald Barcella Guilty of Murder I through The False and Perjured

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192-196 The Jury used False and Perjured Testimony of Brad Bahic To Find Defendant Guilty of Murder I

197-203 The Jury used False and Perjured Testimony of George Lane to Convict Gerald Barcella of murder in the First Degree

204-208 The Jury Found Gerald Barcella guilty of Murder I Through The False and Perjured Testimony of Virginia Wyline Smeltzer

209-211 The Jury Relied upon The False and Perjured testimony of Norman Bennett to Convict Gerald Barcella of murder, either singularly or cumulatively

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- 221 IAC Failure to subject the prosecution to meaningful adversarial challenge
- 222 IAC Insufficient communication between client and investigator
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- 234 IAC Violations of Idaho Bar
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- 235-237 Idaho Rules of Professional Conduct
- 238-241 IAC Failure To present Viable Defense
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motive and opportunity to kill Bill Smith
- 242-247 IAC Failure To Call ALIBI
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- 248-249 IAC Failure to present witness
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Petitioner Lists the following grounds for his application for Post Conviction Relief. Reasons for each are included with petition as part of it.

1) Ineffective Assistance of Counsel

Take judicial notice of underlying criminal file including Transcripts

2) Prosecutorial Misconduct

Take judicial notice of underlying criminal file including transcripts

3) Access To Courts violated

Take Judicial Notice of Underlying Criminal file including transcripts

4) Due Process Rights Violated

Take Judicial Notice of Underlying Criminal file including transcripts.

5) Judge Haman's pretrial decisions violated petitioners rights

Take judicial notice of Underlying Criminal file including transcripts

- 6) Judge Bengsten's decisions and conduct at trial violated petitioner's rights.

Take judicial notice of underlying criminal file including transcripts

- 7) Trial judge should have granted a new trial
Take judicial notice of underlying criminal file including transcripts

- 8) Cumulative effect of trial counsel's errors
Take judicial notice of underlying criminal file including transcripts

- 9) Cumulative effect of judges' wrongful decisions and conduct
Take judicial notice of underlying criminal file including transcripts.

- 10) Cumulative effect of prosecutorial misconduct
Take judicial notice of underlying criminal file including transcripts

- 11) Cumulative effect of trial counsel's errors, pretrial and trial judges' wrongful decisions and conduct and prosecutorial misconduct
Take judicial notice of underlying criminal

file including transcripts.

12) Ineffective Assistance of appellate counsel
Take judicial notice of underlying criminal
file including transcripts

13) The jury used information not in evidence
to convict petitioner
Take judicial notice of underlying criminal
file including transcripts

14) Petitioner's 5th Amendment rights against
self-incrimination were violated
Take judicial notice of underlying criminal
file including transcripts

15) Judges decisions at trial were unjust and
manifestly inconsistent
Take judicial notice of underlying criminal
file including transcripts

16) 8th Amendment rights violated by an
unfair process
Take judicial notice of underlying criminal
file including transcripts

- 17) The jury was improperly selected
Take judicial notice of underlying
Criminal file including transcripts.
- 18) Jury Instructions on murder I and
murder II were improper
Take judicial notice of underlying criminal
file including transcripts
- 19) The jury pool was improperly selected
Take judicial notice of underlying criminal
file including transcripts
- 20) The jury relied on false and perjured
testimony to convict petitioner
Take Judicial notice of underlying Criminal file
including transcripts
- 21) The appellate Court should have over-turned
petitioners conviction and ordered a new trial or
petitioners immediate release
Take judicial notice of underlying Criminal file
including transcripts.

22) Petitioner's right to confront and examine witnesses was denied repeatedly.

Take judicial notice of underlying criminal file including transcripts

23) The jury pool had the potential of being contaminated by a prospective jurors comments

Take judicial notice of underlying criminal file including transcripts.

24) Barcellos 6th Amendment Rights To Confront witnesses were denied

Take Judicial Notice of Underlying Criminal File including Transcripts

25) Barcellos 14th amendment Rights to due process were violated

Take Judicial Notice of Underlying Criminal file including transcripts

26) Barcellos Access to Courts rights were violated.

Take Judicial Notice of Underlying Criminal file including transcripts.

27) Combination of all errors included in this petition along with 2 reversible errors acknowledged in Appeal Response and other reasons sighted in appeal denied Barcella a fair trial

Take Judicial Notice of underlying Criminal file including Transcripts.

28) New evidence not disclosed at trial

Take judicial notice of underlying Criminal file including transcripts.

29) Mr. Barcella's trial was unfair.

Take judicial notice of underlying criminal file including transcripts.

See Appellants brief 07-26-1999

See 2000 Opinion no. 64 Respons from
Idaho Appeal Court # 25216

See Appellants Brief in Support of Petition
for Review

See Appellants Reply brief ~~2~~

Requests for mistrial / Acquittal or New Trial or Manslaughter

Mr Barcella respectfully begs the Court to closely scrutinise and thoroughly read his trial transcripts and the contents of this petition, appeal, and responses.

Mr Barcella respectfully contends the appellate Court wrongly relied upon the the most prejudicial false and contested testimony of states witnesses to claim Barcella would have been convicted despite the 2 reversible errors and other errors all deemed harmless by the Court due to the abundance of evidence against Barcella.

Barcella contends this is a faulty decision as on T.p. 1432, 419 - p. 1433, 41-3 The district Court noted Barcella was convicted upon credibility of the witnesses. There were no eyewitnesses nor physical evidence.

Barcella also contends if the state wished to give Barcella a fair trial they would have disclosed Kenneth Thibaults criminal file to jurors and allowed Mr Barcella to confront Rikki Bobo about her current charges and incarceration at time of trial

Mr Barcella respectfully contends the appellate Court picked and chose testimony most prejudicial

the fact much of it is proven false by other witness testimony.

In Brief of Respondant (0-25-99) included in this petition the state contends "The onsite manager, Bill Smith asked Barcella to remove the sign. In response Barcella raised his hand to Bill as if to hit him. Bill, a slight older man retreated to his room". Testimony of Rikki Bobo shows this to be false T.p. 80042 p 801 L1-4. Bill Smith agreed with Barcella about the sign on his door T.p. 755 L14-20 (the contents of the sign)

This whole alleged scenario was a bad lie perpetrated by prosecutors. There was no problem.

The state contends Kenneth Throft was with Barcella when he arrived at 205 Indiana, argued with Smith and killed Smith.

Bill Solberg and Barcella were drinking in Rathdrum till approx 230 am and they arrived at 205 Indiana at approx 3:00 am. T.p. 471, L9-22

Ken Throft left the bar with Brad Bahey T.p. 921 L17-24 T.p. 770, L2-10

Throft was mentioned in a police report as being at 205 Indiana as early as 830 pm till after 10:00 pm when he passed out in his room. T.p. 1535 L15-p 1536 L1-14

Norman Bennett is with Ken Throft in the

hallway at 205 Indiana at 1:00 am.

T.p. 246, L1-16 See police reports note - 1:00 am
Rikki Bobo testified Barcella called her
from a bar in Rathdrum in the early am.
of 04-03-02. T.p. 691, L18-p 692, L1-15 Barcella had
no reason to lie about his whereabouts
and was too drunk to design and perpetrate
any complicated murder plan T.p. 766, L19-p 768, L1-8
Barcella could barely walk.

Peter Cooper had received no complaints
about Barcella and tried to rent him a larger
downstairs apartment before AND after Bill
Smith's death. T.p. 804, L16-p 805, L1-3

Only John, Rikki Bobo and Solberg at Bar T.p. 770, L2-10

The multitude of errors by the
State, Judge and defense attorneys listed
in this petition added to errors in the
appeal (07-26-99) cumulatively and singly
deprived Barcella of a fair trial and
resulted in a manifest injustice. ~~the~~

Mr. Barcella requests a new trial,
mistrial or acquittal in the interests of
justice, or at a lesser conviction for manslaughter

Also note the defendant's requests for motion
for mistrial/acquittal T.p. 1871-p 2043

Barcelle contends he could not form the intent needed for premeditated murder due to his high state of intoxication confirmed repeatedly throughout trial and discovery. if he did in fact kill Smith.

IN THE SUPREME COURT OF THE STATE OF IDAHO

| | | |
|-----------------------|---|-------------------|
| STATE OF IDAHO, |) | |
| |) | |
| Plaintiff-Respondent, |) | NO. 25216 |
| |) | |
| vs. |) | |
| |) | |
| GERALD A. BARCELLA, |) | APPELLANT'S BRIEF |
| |) | |
| Defendant-Appellant. |) | |

BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE FIRST JUDICIAL
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE
COUNTY OF KOOTENAI

HONORABLE JOHN H. BENGSTON
District Judge

RONALDO A. COULTER
State Appellate Public Defender
State of Idaho

KEVIN J. WLADYKA
Deputy State Appellate Public Defender
Chief, Appellate Unit

MOLLY J. HUSKEY
Deputy State Appellate Public Defender
P.O. Box 83720
Boise, ID 83720-0005
(208) 334-2712

ATTORNEYS FOR
PETITIONER-APPELLANT

MYRNA A.I. STAHRMAN
Deputy Attorney General
Criminal Law Division
P.O. Box 83720
Boise, Idaho 83720-0010
(208) 334-4534

ATTORNEY FOR
RESPONDENT

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STATEMENT OF THE CASE

Nature of the Case

Gerald Barcella appeals from the judgment and sentence, claiming the district court: 1) committed clear error when it improperly admitted preliminary hearing testimony; 2) committed reversible error when it refused to grant a mistrial; 3) erred as a matter of law when it refused to grant a new trial; and 4) abused its discretion when it imposed an excessive sentence. Mr. Barcella submits these trial errors were so prejudicial and of such significance that he was denied his right to a fair trial under the Sixth and Fourteenth Amendments to the United States Constitutions.

Statement of the Facts and Course of Proceedings

On April 3, 1995, William Smith, the landlord of the boarding house where Mr. Barcella lived, was murdered. (R., pp.3-4.) On April 4, 1995, Mr. Barcella was arrested and charged with an unrelated federal firearms offense. (R., pp.6-7, Tr., p.269, Ls.18-25; p.728, Ls.7-10.) While in the Latah County jail for the offense, Mr. Barcella met another inmate named Robert Agrifoglio. (Tr., p.1327, Ls.4-13.) Approximately a year after Mr. Smith's death, and while incarcerated on the firearms charge, Mr. Barcella was charged with the murder of William Smith. (R., pp.3-5.) At the preliminary hearing, Agrifoglio was a witness for the State and testified against Mr. Barcella. (Tr., p.1362, Ls.17-21.) At trial, Agrifoglio refused to testify so the district court declared him unavailable. (Tr.,

p.1347, Ls.15-21.) The district court then allowed Agrifoglio's preliminary hearing testimony to be read into the record at trial. (Tr., p.1347, L.15-p.1350, L.11.)

In Mr. Barcella's case in chief, Mr. Barcella offered the testimony of Mark Durant, a defense investigator assigned to Mr. Barcella's case. (Tr., 1659, L.15 – p.1660, L.17.) Mr. Durant would have testified that between the time of the preliminary hearing and the trial, Agrifoglio called Mr. Durant several times, and told Mr. Durant that the State had pressured and threatened Agrifoglio to testify. (Tr., p.1659, Ls.15-25.) When Mr. Durant asked Agrifoglio whether his preliminary hearing testimony was truthful, Agrifoglio asserted the Fifth Amendment right against self-incrimination. (Tr., p.1659, L.15 – p.1660, L.17.) The State objected to the testimony of Mr. Durant, claiming that if the testimony was admitted, the State would not be able to cross-examine Agrifoglio regarding the subsequent conversations. (Tr., p.1660, Ls.6-17.) The district court refused to allow the testimony of Mr. Durant. (Tr., p.1662, L.1.)

During the testimony of two other State's witnesses, Rikki Bobo and Kenneth Thrift, Mr. Barcella wished to impeach the testimony of each of the two witnesses. Mr. Barcella wanted to inquire into Bobo's incarceration at the time of trial. (Tr., p.680, L.16 – p.681, L.14.) Mr. Barcella also wanted to question her about where she had obtained the civilian clothes and the makeup to wear at the time of testifying. (Tr., p.680, Ls.16-25, p.683, Ls.2-5.) Mr. Barcella wished to question Thrift on his prior record, consisting of 94 arrests, 42 of which were felony charges. (Tr., p.536, Ls.7-10.) The district court prohibited both inquiries, ruling that Bobo's custody status had nothing to do with her truth or veracity and

that Thrift's prior record was outside the scope of Idaho Rules of Evidence (I.R.E.) 609. (Tr., p.683, Ls.7-14, p.539, Ls.22-25, p.540, Ls.12-20, p.553, L.17 – p.554, L.7.)

Also in the course of the State's case in chief, the State admitted testimony of its witness, George Lane, who testified that since Mr. Barcella had committed two other shootings and gotten away with it, Mr. Barcella thought he would get away with this crime. (Tr., p.1184, L.24 – p.1185, L.2.) Mr. Barcella moved for a mistrial, stating that Mr. Lane's testimony was so prejudicial there was no way the jury could disregard it in reaching a verdict. (Tr., p.1185, L.16 – p.1194, L.25.) The district court denied the motion, ruling that the best the court could do was give the jury a curative instruction to ignore the testimony. (Tr., p.1213, L.15 – p.1219, L.2.) After the jury returned from its deliberations, it found Mr. Barcella guilty of murder in the first degree. (R., pp.700-702.) Mr. Barcella was sentenced to a unified life sentence with thirty years fixed. (R., pp.700-702.)

Based on the above evidentiary rulings, Mr. Barcella again moved the court to declare a mistrial. (Tr., p.1201, L.7 – p.1206, L.21.) When that was denied, Mr. Barcella subsequently requested a new trial. (R., pp.591-598.) That motion was also denied. (R., pp.622-628.) It is from those decisions that Mr. Barcella timely appeals. (R., pp.709-713.)

ISSUES

1. Did the district court commit clear error when it permitted the State to read into the record the prior testimony of Robert Agrifoglio without determining whether such testimony met the statutory provisions of I.C. § 9-336, I.R.E. 804(b)(1), or applicable case law?
2. Did the district court commit reversible error when:
 - a. It refused to grant a mistrial based on the statements of the State's witness, George Lane, who stated that Mr. Barcella had "gotten away with" two other shootings and would get away with this one?
 - b. It refused to grant a mistrial when, five days into trial, it allowed the State to disclose twenty-seven pages of a taped interview of Rikki Bobo, one of the State's primary witnesses, which had not been disclosed prior to trial, despite Mr. Barcella's discovery request?
 - c. It refused to grant a mistrial based on Mr. Barcella's allegation that his right to confront witnesses, pursuant to the Sixth Amendment to the United States Constitution, was violated when the district court prohibited adequate cross-examination of two of the State's witnesses, Rikki Bobo and Kenneth Thrift?
3. Did the district court commit error when it refused to grant Mr. Barcella's motion for a new trial on the grounds that the effect of the trial errors asserted in Arguments I and II, both singularly and cumulatively, deprived Mr. Barcella of a fair trial pursuant to the Fourteenth Amendment to the United States Constitution?
4. Did the district court abuse its discretion when it imposed a life sentence with thirty years fixed?



IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 25216

SEP 18 2000

STATE OF IDAHO,

Plaintiff-Respondent,

v.

GERALD A. BARCELLA,

Defendant-Appellant.

2000 Opinion No. 64

Filed: September 18, 2000

Frederick C. Lyon, Clerk

STATE APPPELLATE
PUBLIC DEFENDER

Appeal from the District Court of the First Judicial District, State of Idaho, Kootenai County. Hon. John H. Bengtson, District Judge.

Judgment of conviction and unified sentence of life imprisonment, with thirty years fixed, for first degree murder, affirmed.

Ronaldo A. Coulter, State Appellate Public Defender; Molly J. Huskey, Deputy Appellate Public Defender, Boise, for appellant. Molly J. Huskey argued.

Hon. Alan G. Lance, Attorney General; Rebekah A. Cudé, Deputy Attorney General, Boise, for respondent. Rebekah A. Cudé argued.

SCHWARTZMAN, Judge

Gerald A. Barcella was found guilty of the 1995 murder of William Smith. Barcella appeals his conviction for first degree murder, contending that trial errors resulted in the denial of a fair trial. While we find that a number of errors occurred during the trial, we conclude that these errors were, individually and cumulatively, harmless beyond a reasonable doubt.

I.

GENERAL FACTUAL AND PROCEDURAL BACKGROUND

The state's evidence at trial set forth the following fact scenario: On the evening of April 2, 1995, Barcella told Kenneth Thrift—his drinking buddy for the evening, Virginia Smeltzer—the bartender at the Watering Hole bar in Coeur d'Alene, and Brad Bakie that he intended to kill Smith, the elderly manager of the Harmony House apartments where Barcella resided.

Returning to Barcella's room at the Harmony House apartments after the Watering Hole closed, Barcella and Thrift noisily entered the building and went into Barcella's one-room apartment, across the hall from Smith's room. There, they continued to drink accompanied by the noise of the radio and television. Smith, through the door, told Barcella to turn the volume down. Barcella begrudgingly complied. Some time later, while Thrift returned to his room next door to get some cigarettes and more beer, Barcella entered Smith's room and bludgeoned him in the head with a pulaski.¹ When Thrift came back, about five minutes later, Barcella was at Smith's door, across the hall, wiping off the doorknob with his bandana.

Back in Barcella's room, Barcella told Thrift that he had killed Smith. The two continued drinking beer until about 4:30 a.m. and then left to get breakfast at Denny's Restaurant. From there, Barcella called his girlfriend Rikki Bobo. He told her to get over to Denny's and that he had killed Smith. Once she arrived, Barcella again told Bobo and Thrift that he killed Smith by striking him in the head three times with a pick ax.

After visiting with Barcella and Thrift at Denny's for nearly an hour, Bobo returned to Barcella's room at Harmony House. There, she noticed that Barcella's pulaski was not in his room. When Barcella arrived, Bobo, with Barcella's approval, wrote out a note addressed to Smith requesting a receipt for Barcella's rent payment. Barcella told her that the note was a good idea because it would make the police believe that Barcella thought Smith was still alive. Bobo slipped the note under Smith's door.

Later that afternoon, Peter Cooper, the owner of the Harmony House apartments, discovered Smith's body. Smith had several large head wounds and smaller wounds in his chest. A pulaski was found under a piece of carpet stuffed under Smith's bed. During the homicide investigation, officers discovered that Barcella, a convicted felon, possessed firearms in his room. While in jail on a charge of being a felon in possession of a firearm, Barcella was charged with first degree murder for the killing of Smith, I.C. §§ 18-4001 - 18-4003.

At the preliminary hearing, Robert Agrifolio, a convicted defendant in an unrelated burglary case, testified that in September of 1995 he occupied a jail cell adjacent to Barcella's

¹ A pulaski is a single bit axe with an adze shaped hoe blade extending from the back. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1839 (1993).

cell in the Latah County Jail. After identifying Barcella, Agrifolio testified that, while in the jail's recreation yard, Barcella told him he hit Smith in the head with an ax because he believed Smith had killed his puppy. Agrifolio was cross-examined extensively about his prior convictions, his conversations with Barcella, and his reason for testifying. Agrifolio testified that he was under subpoena and denied being a jailhouse snitch or getting any benefit from testifying against Barcella.

Barcella was bound over to district court for trial on the charge of murder in the first degree. At trial, the state called twenty-two witnesses including investigating officers, medical experts, the Watering Hole bartender, the apartment owner, several apartment residents, Bobo, Thrift and two jailhouse informants—Agrifolio and George Lane.

Before calling Thrift, the state attempted to preclude impeachment through Thrift's prior criminal convictions. In part, Barcella sought to impeach Thrift by introducing evidence of his criminal history, arguing that Thrift is per se untruthful because honest people do not get arrested ninety-four times, forty-two of which were for felonies. The trial court ruled that Thrift's only felony convictions in the last ten years were two DUIs, not crimes relevant to truth and veracity under I.R.E. 609. Thrift testified that Barcella owned a pulaski when he moved into the Harmony House apartments, that Barcella had several times threatened to kill Smith, and that he had seen Barcella wiping off Smith's doorknob with a bandana when Thrift came out of his room with more beer. Thrift also stated that Barcella admitted to killing Smith once he and Thrift returned to Barcella's room to drink more beer and, again, after he and Thrift arrived at Denny's Restaurant for breakfast early the next morning.

Bobo also testified that Barcella owned a pulaski when he moved into the Harmony House apartments. She further testified to Barcella's admissions to killing Smith and acknowledged that she had written a note about rent payment that was slipped under Smith's door to prevent police attention from focusing on Barcella. After challenging Bobo's credibility by questioning her about a plea deal on a recent DUI charge and the state's grant of immunity regarding her writing the rent payment note, Barcella also sought to inquire about her status as a jail inmate and why she was allowed to testify in civilian clothing and makeup. The court sustained the state's objection to this line of inquiry.

The state then attempted to call Agrifolio as its next witness; however, the bailiff reported that Agrifolio had told the jailers that he refused to testify. Agrifolio was brought into court from

the jail and questioned. After he indicated that he did not want to testify, the court appointed counsel for Agrifolio so that he could obtain legal advice before finally deciding whether or not to testify. A day later, Agrifolio's counsel informed the court that Agrifolio would not testify. The district court determined that Agrifolio was unavailable. Four days later, the court, over Barcella's objection, permitted Agrifolio's preliminary hearing testimony to be read into the record.

The state's twentieth witness, Lane, also a jailhouse witness, testified that Barcella had admitted to killing his apartment manager by hitting him in the back of the head because the manager was nagging him about making too much noise. Lane testified that Barcella said a witness, his drinking buddy, had seen him come out of the manager's apartment on the night of the murder. Lane testified that Barcella was not worried about being prosecuted because in the past he had shot a couple of people and was never convicted. Barcella immediately objected and moved for a mistrial on the grounds that the state has elicited testimony about prior bad acts in violation of I.R.E. 404. The district court denied the motion for a mistrial and instructed the jury to disregard Lane's last statement.

Barcella also sought a mistrial on the ground that the state made a late disclosure of the first twenty-seven pages of the transcript of Bobo's statement to the police. The court denied the motion, suggesting Barcella could avoid any prejudice caused by late disclosure by recalling Bobo as a witness. Barcella declined to do so.

The trial court denied Barcella's motion for a judgment of acquittal made at the close of the state's case. During Barcella's case-in-chief, Barcella did not testify. After presenting several character witnesses in defense, Barcella sought to introduce testimony from Kootenai County Public Defender's Office Investigator Mark Durant. Durant was to testify that Agrifolio had recently made several unsolicited telephone calls to him, stating that he—Agrifolio—had been pressured into testifying at the preliminary hearing and, that when asked if his preliminary hearing testimony had been truthful, Agrifolio had said he would "take the Fifth Amendment on that." The state objected and the court, without explanation, disallowed Durant's testimony.

The jury returned a verdict of guilty to first degree murder and found that Barcella had used a deadly weapon in the commission of the murder. Barcella filed a motion for new trial re-raising the issues he had raised at trial—Lane's blurt about Barcella having shot two people in the past and gotten away with it, the late disclosure of the first twenty-seven pages of Bobo's

statement to the police, the admission of Agrifolio's preliminary hearing testimony, the trial court's preclusion of Durant's impeachment of Agrifolio's preliminary hearing testimony, and the court's refusal to allow Barcella to inquire into Thrift's record of prior arrests to impeach him for lack of truthfulness. The district court denied Barcella's motion for a new trial, explaining that Barcella had failed to demonstrate prejudice from the state's late disclosure of a portion of Bobo's statement to the police and that Lane's "couple of shootings" blurt had been dealt with by instructing the jury to disregard that statement. The court also ruled that Agrifolio's purported refusal to testify made him unavailable, allowing his preliminary hearing testimony to be read into the record, that I.R.E. 609 did not permit Barcella to impeach Thrift with his prior arrests, and that Barcella had made no offer of proof regarding impeachment of Agrifolio's preliminary hearing testimony.

The state filed a notice of intent to seek the death penalty, and a hearing was held on aggravating and mitigating circumstances. The district court found that the state had failed to prove the existence of any statutory aggravating circumstance beyond a reasonable doubt and thus the death penalty could not be imposed. At sentencing, the district court imposed a term of life imprisonment, with thirty years fixed. The court denied Barcella's I.C.R. 35 motion for reduction of the sentence. Barcella appeals.

II.

GENERAL STANDARD OF REVIEW

In this appeal, we must first determine whether the trial errors alleged by Barcella are actual errors; and second, whether any such errors, singularly or cumulatively, require the judgment of conviction to be vacated. An error or defect in a criminal trial that does not affect the defendant's substantial rights will not necessitate a new trial. I.C.R. 52; *State v. Pizzuto*, 119 Idaho 742, 753, 810 P.2d 680, 691 (1991) *overruled on other grounds* *State v. Card*, 121 Idaho 425, 825 P.2d 1081 (1991). Accordingly, convictions will not be set aside for errors or defects that have little, if any, likelihood of having changed the results of the trial. *Chapman v. California*, 386 U.S. 18, 22 (1967); *State v. Garcia*, 100 Idaho 108, 111, 594 P.2d 146, 149 (1979); *State v. Reynolds*, 120 Idaho 445, 451 n. 5, 816 P.2d 1002, 1008 n. 5 (Ct. App. 1991).

"The test for harmless error . . . is whether a reviewing court can find beyond a reasonable doubt that the jury would have reached the same result without the admission of the challenged evidence." *State v. Moore*, 131 Idaho 814, 821, 965 P.2d 174, 181 (1998); *Giles v.*

State, 125 Idaho 921, 925, 877 P.2d 365, 369 (1994). Where an error concerns evidence omitted at trial, the test for harmless error is whether there is a reasonable possibility that the lack of excluded evidence contributed to the verdict. *State v. Harris*, 132 Idaho 843, 847, 979 P.2d 1201, 1205 (1999).

III.

THE DISTRICT COURT'S DENIAL OF BARCELLA'S MOTION FOR A MISTRIAL IMMEDIATELY FOLLOWING LANE'S BLURT ABOUT BARCELLA HAVING COMMITTED A COUPLE OF SHOOTINGS IN THE PAST AND REGARDING THE LATE DISCLOSURE OF THE FIRST TWENTY-SEVEN PAGES OF BOBO'S STATEMENT TO THE POLICE

A. Standard Of Review

In criminal cases, motions for mistrial are governed by I.C.R. 29:1, which provides in part that "[a] mistrial may be declared upon motion of the defendant, when there occurs during the trial an error or legal defect in the proceedings, or conduct inside or outside the courtroom, which is prejudicial to the defendant and deprives the defendant of a fair trial." Our standard for review of a refusal to grant a mistrial is well established:

[T]he question on appeal is not whether the trial judge reasonably exercised his discretion in light of circumstances existing when the mistrial motion was made. Rather, the question must be whether the event which precipitated the motion for mistrial represented reversible error when viewed in the context of the full record. Thus, where a motion for mistrial has been denied in a criminal case, the 'abuse of discretion' standard is a misnomer. The standard, more accurately stated, is one of reversible error. Our focus is upon the continuing impact on the trial of the incident that triggered the mistrial motion. The trial judge's refusal to declare a mistrial will be disturbed only if that incident, viewed retrospectively, constituted reversible error.

State v. Shepherd, 124 Idaho 54, 57, 855 P.2d 891, 894 (Ct. App. 1993) (citing *State v. Urquhart*, 105 Idaho 92, 95, 665 P.2d 1102, 1105 (Ct. App. 1983)). See also *State v. Guinn*, 114 Idaho 30, 752 P.2d 632 (Ct. App. 1988); *State v. Stoddard*, 105 Idaho 169, 667 P.2d 272 (Ct. App. 1983). "[The] error will be deemed harmless if the appellate court is able to declare, beyond a reasonable doubt, that there was no reasonable possibility that the evidence complained of contributed to the conviction. *Shepherd*, 124 Idaho at 58, 855 P.2d at 895 (citing *State v. LePage*, 102 Idaho 387, 630 P.2d 674 (1981)).

B. Lane's Blurt About Barcella Having Committed Two Prior Shootings

Lane testified that he shared a pod (a group of cells) with Barcella in the Kootenai County Jail in January or February of 1997. Lane said that Barcella told him he had killed "an

older guy, a manager of an apartment building" and that the victim irritated Barcella by complaining about the volume of his radio and television. Lane testified that Barcella told him a drinking partner had been around at the time he hit the victim, but Lane could not recall the drinking partner's name. When asked whether Barcella had said the drinking partner had seen Barcella in the area of the victim's room, Lane said, "Yeah, that he was the only party he was worried about." Then, the prosecutor asked, "Did the defendant ever tell you whether he believed he was going to be convicted or not?" Lane answered that Barcella said he would not be. When asked why, Lane said, "*Probably because he had had a couple other shootings under his belt and he was never convicted.*"

Barcella immediately objected and asked, outside the presence of the jury, for a mistrial on the ground that the state had elicited in front of the jury a confession from the defendant that he had twice shot somebody and had gotten away with it—evidence of prior bad acts prohibited by I.R.E. 404. Barcella argued that the state had possessed a transcript of Lane's testimony for a long time, had spoken with Lane and his attorney and knew about the two prior shootings statement, but did absolutely nothing to prevent it from coming in, and that there was no way to unring the bell in the jurors' heads. The prosecutor asserted the information was not knowingly adduced and that the expected answer was that Barcella had said, "Nobody could prove that I was in that apartment," an answer that appears in the transcript of Lane's police interview. The prosecutor admitted that he prepared his questions from the transcript of Lane's statement, which included Lane's comment that Barcella said he "[had] shot a couple of people two other times," but not that he had gotten away with it. The prosecutor stated that a copy of the transcript was delivered to Lane and that Lane was told that he would be asked questions directly from it. However, he did not advise Lane about what Lane could or could not talk about because he did not want to give the appearance of coaching Lane. After a recess, the court noted that the defense opening statement had already informed the jury they would hear that Barcella was arrested several days after Smith's murder because he had guns in his room and had previously been convicted of a felony. The court then denied the motion for a mistrial, explaining:

Now, I recognize that the defendant's contention or argument in support of the motion for mistrial is that the last few words uttered by the witness Lane just prior to the objection were . . . gratuitously made. I recognize the defendant's concern, and I had some concern, . . . that the state should have taken perhaps more steps to caution witnesses as to the areas that they should eschew that they should avoid bringing to the attention of the jury.

Here, in summary, the jurors anticipated . . . based on defense counsel's opening statement, that they would hear some bad things about the defendant's prior conduct. And it should come as no surprise to them.

Now, I've weighed the effect of that statement of Mr. Lane made, against all the circumstances in this case and in particular the defendant's anticipation and statement to the jury that they are going to hear some bad things about the defendant.

The best I can do is admonish the jurors they cannot find the defendant guilty merely because of prior acts on his part that were less than savory. And I certainly will make that very strong in final instructions to the jury.

The motion for mistrial is denied.

The court then admonished the jury not to consider Lane's last answer as evidence and instructed them to "totally disregard it." The district court later denied Barcella's motion for new trial or judgment of acquittal, explaining that it had both admonished the jury to disregard Lane's "couple of shootings" statement and formally instructed the jury to disregard the statement.

On appeal, the state *concedes* that Lane's two prior shootings statement was not properly admissible, but argues that its interjection into the trial was harmless error. The right to due process does not guarantee a defendant an error-free trial, but a fair one. *Bruton v. United States*, 391 U.S. 123 (1968). Idaho Rule of Evidence 404(b) prohibits the admission of evidence of other crimes or wrongs for the purpose of showing a person's character or propensity to commit crimes. *State v. Vierra*, 125 Idaho 465, 471, 872 P.2d 728, 734 (Ct. App. 1994); *Guinn*, 114 Idaho at 34, 752 P.2d at 636. When a motion for mistrial is made, the question is "whether the event which precipitated the motion for mistrial represented reversible error when viewed in the context of the full record," i.e., whether Lane's blurt contributed to the verdict in light of all the other evidence. *Shepherd*, 124 Idaho at 57, 855 P.2d at 894; *Guinn*, 114 Idaho at 34-35, 752 P.2d at 636-37.

Although the interjection of the "couple other shootings" statement was plainly improper, we conclude that it was harmless beyond a reasonable doubt.² Lane was the state's twentieth witness. Prior to his testimony, the jury had been told by the defense that Barcella had a prior

² We do not interpret Lane's blurt as meaning that Barcella was guilty of two previous murders.

felony conviction. The jury heard testimony from bartender Smeltzer, bar patron Bakie,³ and Thrift that Barcella had told them he intended to kill Smith. The jury also heard testimony from Thrift, Bobo and Lane that Barcella admitted to killing Smith. Thrift and Bobo both testified that Barcella owned a pulaski. Thrift also testified that he saw Barcella wiping off Smith's doorknob with a bandana when Thrift came out of his room the night Smith was killed. Bobo testified that the pulaski was missing from Barcella's room the next day. A pulaski was recovered from under the bed in Smith's room.

As previously noted, an error will be deemed harmless if the appellate court is able to declare, beyond a reasonable doubt, that there was no reasonable possibility that the evidence complained of contributed to the conviction. *See also State v. LePage*, 102 Idaho 387, 393, 630 P.2d 674, 680 (1981); *State v. Rupp*, 118 Idaho 17, 19, 794 P.2d 287, 289 (Ct. App. 1990). We are convinced, beyond a reasonable doubt, that even if Lane's blurt about prior shootings had not been heard by the jury, the remaining evidence would have easily led the jury to return a guilty verdict. *Shepherd*, 124 Idaho at 57, 855 P.2d at 894; *Guinn*, 114 Idaho at 34-35, 752 P.2d at 636-37. Given the totality of admissible evidence, and when viewed in context of the full record, Lane's blurt did not contribute to Barcella's conviction. Accordingly, the district court correctly denied Barcella's motion for mistrial. Additionally, the district court properly denied Barcella's motion for a new trial as to this ground.

C. The Late Disclosure Of The First Twenty-Seven Pages Of Bobo's Statement To The Police

Where the late disclosure of evidence forms the basis of an alleged due process violation, the defendant must show the late disclosure to have been so prejudicial to the defendant's preparation of his or her case that a fair trial was denied. *State v. Tapia*, 127 Idaho 249, 255, 899 P.2d 959, 965 (1995); *State v. Canelo*, 129 Idaho 386, 389, 924 P.2d 1230, 1233 (Ct. App. 1996). To prove prejudice, a defendant must show there is a reasonable probability that, but for the late disclosure of evidence, the result of the proceeding would have been different. *Tapia*, 127 Idaho at 255, 899 P.2d at 965.

³ Bakie testified that he heard Barcella threaten to kill Smith ten times on the evening of April 2, 1995.

After Bobo had testified, the state found and disclosed to the defense the first twenty-seven pages of a transcribed taped statement Bobo had made to the police. Barcella made a motion for mistrial on this ground, arguing that "for the state to give us twenty-seven pages of a transcript between their main witness and police directly related to this crime, after the witness has testified and five days into trial, is fundamentally prejudicial." The state responded that a copy of all the tapes had been copied for the defense long before trial. Barcella maintained that his discovery request included all tapes and that he never received the tape from which the transcript was made.

The trial court reviewed the twenty-seven page transcript and thereafter stated:

Maybe [the company that copied the tapes] didn't give them the tape. The only way to solve this, and I think it's got to be resolved to afford the defendant the opportunity to further examine Ms. Bobo. I will deny a mistrial. I will just explain to the jurors that Ms. Bobo is going to be further cross-examined, and then based on whatever her testimony is, you will have the opportunity . . . to examine her then.

Rather than calling Bobo as a witness, Barcella requested leave to enter into a stipulation with the state to read into evidence the fact that Bobo told the police that when she got to Denny's Restaurant the waitress picked up Barcella's plate at 7 a.m. The court granted Barcella's request, and pursuant to the stipulation, informed the jury that: "When Rikki Bobo arrived at Denny's on the morning of April 3, 1995, Gerald Barcella and Kenneth Thrift were eating and a waitress took their plates around 7 [a.m.]. That is an established fact in this case."

Assuming, without deciding, that the state did commit a discovery violation, Barcella has failed to show how he was prejudiced by this violation. The defense was afforded the opportunity to re-examine Bobo. Any information the defense wished to bring out was available on re-examination of Bobo in front of the jury. The defense declined to do so and instead availed itself of the opportunity to present the above stipulation to the jury. Given that Barcella did not recall Bobo as a witness and only elected to offer the above stipulation, Barcella has failed to establish that, but for the late disclosure of the twenty-seven page transcript, there was a reasonable probability that the result of the trial would have been different. I.C.R. 16; *Tapia*, 127 Idaho at 255, 899 P.2d at 965; *Canelo*, 129 Idaho at 389, 924 P.2d at 1233. Thus, any

discovery violation by the state was harmless.⁴ *State v. Marek*, 112 Idaho 860, 868, 736 P.2d 1314, 1322 (1987) (lack of showing prejudice from failure to comply with discovery request rendered error, if any, harmless); *State v. Cochran*, 129 Idaho 944, 949-50, 935 P.2d 207, 212-13 (Ct. App. 1997). Additionally, the district court properly denied Barcella's motion for a new trial as to this ground.

IV.

EVIDENTIARY RULINGS REGARDING LIMITATIONS ON CROSS-EXAMINATION OF BOBO AND THRIFT

The "[c]ontrol of cross-examination of a witness is committed to the sound discretion of the trial judge, and absent a showing of prejudice, a limitation of cross-examination imposed by a trial judge will not be overturned on appeal." *Marek*, 112 Idaho at 867, 736 P.2d at 1321; *State v. Pierce*, 107 Idaho 96, 104, 685 P.2d 837, 845 (Ct. App. 1984).

Before Bobo was called to the stand and sworn, the state moved to prohibit the defense from inquiring into the fact that Bobo was in jail. The state represented that she had been arrested the day before on two misdemeanor warrants in Kootenai County and one misdemeanor warrant from Shoshone County, all for failures to appear and/or pay fines. Barcella sought to challenge Bobo's veracity by eliciting evidence that she was residing at the jail. He argued that, to prevent a misrepresentation to the jury, he should be allowed to elicit testimony showing that she was in jail and that the prosecutor let her put on civilian clothes even though the jail did not allow such. The state objected to the defense's proposed inquiry. The court rejected Barcella's offer of proof on that point as not relevant to truth and veracity.

Bobo then testified to Barcella's admissions of murder and his ownership of a pulaski when he moved into the Harmony House apartments. Barcella fully cross-examined Bobo on an immunity agreement regarding a possible accessory charge and Bobo's recent DUI, reduced from a felony to a misdemeanor because one of her prior convictions was not constitutionally valid. However, Barcella was not allowed to inquire into her residence at the jail and ask why she was allowed to testify in civilian clothing and makeup.

As stated in *State v. Araiza*, 124 Idaho 82, 91, 856 P.2d 872, 881 (1993), exposure of the

⁴ Barcella has failed to include pages one through twenty-seven of the Bobo statement transcript in the appellate record.

witness's motivation in testifying is always a proper and important function of the constitutionally protected right of cross-examination. However, the mere fact that Bobo was in jail and allowed to testify in civilian clothes was, at best, only marginally relevant and well within the trial court's discretion to control under I.R.E. 403. A trial court may reasonably limit cross-examination that is marginally relevant. *Id.* (citing *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986)). This is especially true where, as here, Barcella was extended considerable latitude in exploring Bobo's possible bias and motive. Accordingly, we conclude that the court did not abuse its discretion in this regard.

Barcella also sought to impeach Thrift with his prior record of ninety-four arrests, arguing that he was per se untruthful because an honest person would not have that many arrests for serious crimes. The court asked if Barcella sought to attack Thrift's character under I.R.E. 609, which permits impeachment by evidence of a prior felony conviction where the nature of the conviction is relevant to truthfulness and the conviction is not more than ten years old. Counsel for Barcella asserted that there were other rules under which Thrift's credibility could be impeached. When asked what character evidence would be offered, counsel said "[t]hat he has been arrested ninety-four times, including forty-two felonies." Thereafter, the court ruled that Thrift had only two felony convictions within the last ten years, both DUI's, that neither was indicative of lack of credibility, and that neither had probative value.

The district court's ruling was consistent with I.R.E. 609(a), which prohibits the admission of prior convictions that are not relevant to credibility. Furthermore, while I.R.E. 609(b) allows the use of prior convictions over ten years old upon adequate prior notice to the opposing party, Barcella provided no such notice. Accordingly, we conclude that the trial court did not improperly restrict the cross-examination of Thrift.

V.

ADMISSION OF AGRIFOLIO'S PRELIMINARY HEARING TESTIMONY AND THE EXCLUSION OF DURANT'S IMPEACHMENT TESTIMONY

A. The Trial Court's Ruling That Agrifolio Was An Unavailable Witness

Idaho Rule of Evidence 804(a) defines unavailability for purposes of determining the admissibility of former testimony under I.R.E. 804(b)(1) and Idaho Code § 9-336. Rule 804(a) states in pertinent part:

(a) Definition of Unavailability. "Unavailability as a witness" includes situations in which the declarant:

(2) persists in refusing to testify concerning the subject matter of declarant's statement despite an order of the court to do so;

Where a witness maintains his refusal to testify in spite of appropriate judicial pressure, he or she is unavailable. *State v. Hoak*, 107 Idaho 742, 746, 692 P.2d 1174, 1178 (1984) (witness unavailable where ordered to testify, refused to do so and held in contempt). *See also State v. Mee*, 102 Idaho 474, 480, 632 P.2d 663, 669 (1981).

Idaho Rule of Evidence 804(a)(2) and F.R.E. 804(a)(2) use exactly the same language.

As Professors Mueller and Kirkpatrick explain:

A declarant is unavailable under FRE 804(a)(2) if he "persists in refusing to testify concerning the subject matter" of his statement despite a court order to do so. Typically such unavailability appears when the court overrules a privilege claim and tells the witness to answer but he refuses. Sometimes witnesses refuse without giving reasons, most often in criminal cases where the prosecutor wants their testimony and witnesses are afraid of the defendant, or reluctant to send friends to jail, or to be involved in the effort to punish.

Obviously showing this kind of unavailability involves calling the declarant, putting questions that elicit his refusal to answer, and then getting a court order directing him to testify. Representing that he will not testify is usually not enough, although a clear and careful statement refusing to cooperate is sometimes sufficient, and a mere claim of privilege is not the same as refusing to testify. Clearly the rule contemplates a refusal to testify despite judicial pressure. Usually it is appropriate for the judge to tell the witness that continued refusal will put him in contempt and subject him to incarceration or other punishment, since such warnings test the refusal and show an effort to obtain live testimony.

CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE § 8.53, at 1002-03 (1995). The Advisory Committee notes to subsection (a)(2) of I.R.E. 804 reflect the intent behind the rule—that the witness's testimony will be deemed unavailable if the court orders the witness to testify and he or she persists in refusing to do so in violation of that order:

[I]f the declarant persists in refusing to testify regarding the subject matter of his statement despite an order to so testify, he is considered unavailable. This situation could arise when the witness refuses to testify under an improper claim of privilege. If the court thereby orders the witness to testify and he persists in refusing, the witness will then be considered unavailable for the purpose of this rule.

REPORT OF IDAHO STATE BAR EVIDENCE COMMITTEE § C 804, p. 2 (1985). A similar intent is expressed in the Advisory Committee Note to the federal rule.

As previously noted, Agrifolio was brought into court and questioned about his purported refusal to testify. In response to the court's inquiry, Agrifolio said that he did not have a reason

for refusing to testify, only that he did not want to have anything to do with the case against Barcella. When the court asked if Agrifolio believed that his testimony might lead to a perjury or other criminal charge, he answered, "No." Agrifolio was then placed under oath and questioned by the state. He testified that he had "pretty much made up [his] mind" not to testify because he was fearful of retribution for being a snitch. When counsel for Barcella asked if he wanted a lawyer, Agrifolio responded "Yes, . . . I feel the need to explore my options." The court appointed counsel and Agrifolio was then returned to the jail.

The next day, counsel for Agrifolio appeared in court, *without* his client, and explained that Agrifolio would not testify under the present circumstances—notwithstanding his status as a state prisoner, the court's power to the extent that it could be exerted on him, and the possibility his preliminary hearing testimony might be used against Barcella if he refused to testify. The state did not request and the court did not order Agrifolio back into court for a first-hand inquiry into his purported refusal to testify. Instead, over Barcella's objection, the district court ruled that Agrifolio's apparent decision not to testify rendered him unavailable under I.R.E. 804(a)(2) and that his prior testimony at the preliminary hearing would be admissible hearsay under I.R.E. 804(b)(1). Moreover, the state did not immediately move for admission of Agrifolio's preliminary hearing testimony, opting to wait until after the presentation of its other witnesses.

Four days later, the state sought to use Agrifolio's preliminary hearing testimony as evidence against Barcella. Again, the state did not request that Agrifolio be brought into court for further inquiry and ordered to testify. Likewise, the district court did not test Agrifolio's resolve by ordering him to testify under the immediate threat of contempt.

An essential component in a declaration of unavailability under 804(a)(2) is an order from the court directing the witness to testify at the time the proponent of the testimony seeks to have that testimony admitted. *See, e.g., United States v. Doerr*, 886 F.2d 944, 953-55 (7th Cir. 1989) (Court's determination that witness was unavailable four days after witness's refusal to testify despite order to do so and finding of civil contempt was improper. The court's failure to inquire as to whether the witness was still recalcitrant at the time the state sought to offer the witness's grand jury testimony was error.); *United States v. Oliver*, 626 F.2d 254, 261 (2nd Cir. 1980) (Faced with a witness who still refused to testify after his assertion of a Fifth Amendment privilege was properly denied, the court should have ordered the witness to testify outside the presence of the jury and warned that the continued refusal to testify despite the court's order

would be punishable by contempt.). As set forth above, Agrifolio was not brought back before the court on the day the state sought to use his testimony, and so the court never tested his purported refusal to testify at that time by ordering him to testify under the immediate threat of contempt. "[I]t is always possible that a recalcitrant witness who does not respond to judicial pressure will testify when ordered to do so rather than face contempt proceedings for refusal to obey the court's order." *Oliver*, 626 F.2d at 261. This choice was never put to Agrifolio.

Accordingly, we hold that the trial court erred in ruling that Agrifolio was in fact an unavailable witness without first bringing him back into court and ordering him to testify under the direct threat of contempt.⁵ Agrifolio was not an unavailable witness as defined by I.R.E. 804(a)(2) and the admission of his preliminary hearing testimony was error.

B. The Trial Court's Exclusion Of Agrifolio's Subsequent Inconsistent Statements

Barcella argues that once Agrifolio's preliminary hearing testimony was admitted, the district court denied him a fair trial by precluding him from establishing Agrifolio's bias and motive through the testimony of investigator Durant.

After the district court had admitted Agrifolio's preliminary hearing testimony, Barcella sought, in an offer of proof, to introduce testimony from Durant that Agrifolio had voluntarily telephoned the Public Defender's Office and told Durant that he felt that he was being pressured and threatened with harder prison time to force him to testify. Durant would also testify that when he asked Agrifolio if his preliminary hearing testimony was truthful, Agrifolio said he would "take the Fifth Amendment on that," which indicated to Durant that Agrifolio's prior testimony had not been truthful. Durant's statements were set forth in an affidavit asserting that the phone conversations with Agrifolio were recorded. Barcella argued that what he wanted to present was evidence that Agrifolio had not been truthful in his prior testimony. Sustaining the state's objection, the court, without explanation, refused to allow Durant to testify.

Idaho Rule of Evidence 806 provides:

ATTACKING AND SUPPORTING CREDIBILITY OF DECLARANT.

When a hearsay statement . . . has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had

⁵ We would otherwise rule Agrifolio's testimony to have met the requirements of I.R.E. 804(b)(1).

testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with declarant's hearsay statement, is not subject to any requirement that declarant may have been afforded an opportunity to deny or explain.

See also D. CRAIG LEWIS, IDAHO TRIAL HANDBOOK § 19.9, at 228-29 (1995) (When impeachment is done through the use of inconsistent statements, I.R.E. 806 exempts such impeachment from the requirement that the declarant have an opportunity to explain or deny the statement.). Although Durant would not have been able to testify to what he thought Agrifolio meant by "taking the Fifth," as opposed to letting the jury make the determination, Agrifolio's unsolicited statements to the public defender investigator regarding alleged prosecutorial pressures to secure his testimony goes directly to motive, interest and bias. As stated in *Delaware v. Van Arsdall*, 475 U.S. 673, 679-80 (1986) and *Davis v. Alaska*, 415 U.S. 308, 316-17 (1974), exposure of the witness's motivation in testifying is always a proper and important function of the constitutionally protected right of cross-examination.

Accordingly, we hold that the trial court erred in excluding Durant's impeachment testimony of Agrifolio's preliminary hearing transcript. *Araiza*, 124 Idaho at 91, 856 P.2d at 881; *State v. Kenner*, 121 Idaho 594, 597, 826 P.2d 1306, 1309 (1992).

C. Harmless Error

Nevertheless, from our review of the entire record, Agrifolio's preliminary hearing testimony added little more than a small amount of weight to the massive quantity of evidence of Barcella's guilt that was already before the jury. His testimony, which included extensive cross-examination, contained a few additional details about how Barcella allegedly killed Smith. However, its effect was almost entirely corroborative of testimony given by previous witnesses. Thus upon the record before us we conclude, beyond a reasonable doubt, that the erroneous admission of Agrifolio's preliminary hearing transcript did not contribute to the conviction, because the jury would have convicted Barcella regardless. See *State v. Cross*, 132 Idaho 667, 669-70, 978 P.2d 227, 229-30 (1999). We further conclude that there is no reasonable possibility that the erroneous exclusion of Durant's proffered testimony about Agrifolio's subsequent statements contributed to the verdict. Accordingly, the errors were harmless beyond a reasonable doubt. Barcella was not entitled to a new trial on this basis.

VI.

CUMULATIVE ERROR

As we recently explained in *State v. Lovelass*, 133 Idaho 160, 171, 983 P.2d 233, 244 (Ct. App. 1999):

The doctrine of cumulative error is predicated on the finding of error in the first instance. *State v. Medina*, 128 Idaho 19, 29, 909 P.2d 637, 647 (Ct. App. 1996). Although individual errors may be deemed harmless, 'an accumulation of such errors may deprive a defendant of a fair trial.' [citations omitted].

In order to find cumulative error, this Court must first conclude that there is merit to more than one error alleged by Barcella and then conclude that these errors, when aggregated, denied Barcella a fair trial. *See State v. Gray*, 129 Idaho 784, 804, 932 P.2d 907, 927 (Ct. App. 1997) (defining cumulative error as an accumulation of errors which may be harmless individually but in the aggregate operate to deny the defendant a fair trial in violation of the defendant's constitutional right to due process).

The material errors in this case were Lane's blurt about two prior shootings, the admission of Agrifolio's preliminary hearing transcript based upon unavailability, and the exclusion of Durant's testimony concerning Agrifolio's unsolicited phone calls to impeach his preliminary hearing testimony. As set forth above, analysis of these three errors, in light of the full record, leads to the conclusion that, even without the erroneously admitted evidence, there is overwhelming evidence of Barcella's guilt. Thus, we are confident, beyond a reasonable doubt, that the cumulative effect of these errors did not contribute to Barcella's conviction or otherwise affect his substantial rights. The jury would have reached the same result regardless. Accordingly, we reject Barcella's cumulative error claim.

VII.

SENTENCE REVIEW

Where a sentence is within the statutory limits, the appellant bears the burden of demonstrating that it is a clear abuse of discretion. *State v. Hedger*, 115 Idaho 598, 604, 768 P.2d 1331, 1337 (1989). A sentence may constitute a clear abuse of discretion if it is unreasonable upon the facts of the case. *State v. Broadhead*, 120 Idaho 141, 145, 814 P.2d 401, 405 (1991), *overruled on other grounds by State v. Brown*, 121 Idaho 385, 825 P.2d 482 (1992).

[A] term of confinement is reasonable to the extent it appears necessary, at the time of sentencing, to accomplish the primary objective of protecting society and to achieve any or all of the related goals of deterrence, rehabilitation or retribution

applicable to a given case. A sentence of confinement longer than necessary for these purposes is unreasonable.

Such determinations cannot be made with precision. In deference to the discretionary authority vested in Idaho's trial courts, we will not substitute our view for that of a sentencing judge where reasonable minds might differ. An appellant must show that, under any reasonable view of the facts, his sentence was excessive in light of the foregoing criteria.

Broadhead, 120 Idaho at 145, 814 P.2d at 405, quoting *State v. Toohill*, 103 Idaho 565, 568, 650 P.2d 707, 710 (Ct. App. 1982). Where an appellant asserts that the sentencing court imposed an excessively harsh sentence, we conduct an independent review of the record and focus upon the nature of the offense and the character of the offender. *State v. Hernandez*, 121 Idaho 114, 118, 822 P.2d 1011, 1015 (Ct. App. 1991); *State v. Reinke*, 103 Idaho 771, 772, 653 P.2d 1183, 1184 (Ct. App. 1982). With respect to sentences imposed under the Uniform Sentencing Act:

the minimum period [of confinement] generally will be treated as the probable measure of confinement for the purpose of sentence review. By focusing on this period, we do not wholly disregard the aggregate length of the sentence, nor do we suggest that a prisoner will be *entitled* to parole when the minimum period has elapsed; but we do recognize that he will be *eligible* for parole at that time.

State v. Sanchez, 115 Idaho 776, 777, 769 P.2d 1148, 1149 (Ct. App. 1989).

Barcella, thirty-eight years old at the time of sentencing, argues that the fixed thirty-year portion of his sentence should be reduced to allow Barcella the opportunity to be rehabilitated. Barcella must demonstrate that this thirty-year period was an abuse of the district court's discretion. Barcella's criminal record contains twenty-one instances of violence against others, including assaults, breach of the peace, bar fights and malicious injury to property, spanning a period of twenty-one years. The instant offense was the brutal murder of an elderly frail man. Barcella's reasons for killing him were senseless. He was irritated at Smith for nagging him about being noisy and offensive. The trial court, after a formal hearing in consideration of the death penalty, concluded that the state had failed to prove any statutory aggravating factor beyond a reasonable doubt. Nevertheless, protection of society required a substantial sentence. Therefore, the court imposed a life sentence, with thirty years fixed. We cannot say that the district court abused its discretion in imposing this sentence.

VIII.

CONCLUSION

As set forth above, although we find error in the admission of Agrifolio's preliminary hearing testimony, in the denial of Barcella's opportunity to challenge the veracity of Agrifolio's testimony, and in Lane's blurt about two prior shootings, these errors, both individually and cumulatively, were harmless. Additionally, the district court did not abuse its discretion in sentencing Barcella to life imprisonment, with thirty years fixed, for first degree murder. Accordingly, Barcella's conviction and sentence are affirmed.

Judge LANSING and Judge Pro Tem SCHILLING CONCUR.



Ineffective Assistance of
Appellate Counsel

Take Judicial notice of underlying Criminal file
including transcripts.

Request To Reopen Appeal
or allow evidence in

Post Conviction Petition due to
Ineffective Assistance of Appellate Counsel
Mr. Barcella respectfully requests the Court
allow him to reopen his appeal or allow evidence
in post-conviction relief petition that Barcella
contends should have been put in his appeal but
was not due to ineffective assistance of
appellate counsel. Mr. Barcella was not aware
of his right to prose amendment of his
appeal at the time of appellate procedures
and was never schooled in law.

Mr. Barcella was never informed of appellate
procedures by his appellate counsel and several
repeated requests to raise issues on appeal went
unheeded by appellate counsel despite the
record bared them out and several of the
issues were raised in motion for mistrial/
Acquittal by trial counsel I.p. 1801-p. 1871
and several of these issues were raised by
Appellate counsel's predecessor, Atty Michaeline
Murphy in Notice For Appeal (12-16-98)

Mr. Barcella between approx 02-01-99 and
07-26-99 repeatedly requested all issues raised
by trial counsel in motion For New Trial/Acquittal
and Notice of Appeal be raised on appeal.

080

IAC Appellate Counsel

Mr Barcella specifically requested the following issues be raised

Prosecutor's highly prejudicial information not in evidence of prior bad acts of Barcella in Opening Statement That Barcella allegedly had a duffel-bag with a sawed-off shotgun, hatchet in it and a large knife on his back (belt) T.p. 261, 418-p. 262, 41-9

Prosecutors proffered this testimony from Virginia Wyline Smeltzer T.p. 499, 414-21

Prosecutors again proffered or suggested (rang the bell) about duffel bag in cross-examination of Kenneth Throft T.p. 564, 46-16

Prosecutor's proffered testimony from Det. Wolf about a hatchet in the courtroom that was alleged to be Barcella's, suggesting Barcella was some sort of axe-murderer as noted by Judge Bengsten T.p. 1109-p. 1113, 41-20

Mr Barcella requested counsel raise

F A C Appellate Counsel

the issues of false and perjured testimony including that of
Off. John Kelly T.p. 277, 280 - p 322, 21-16

On many, many occasions Mr. Barcella vehemently requested his counsel, Atty Molly Husky raise the issue of prosecutors' threats to George Lane through his attorney to testify against Barcella. T.p. 1590, - p 1603
21-22 and T.p. 1630 - p 1663, 21-22

Barcella's trial counsel though this a substantial appellate issue and raised it in Motion For new Trial/Acquittal T.p. 1842, 224 -
p. 1843, 21-9

A pattern of prosecutor Haynes threatening witnesses showed itself as Haynes threatened witness Robert Agostino to testify
T.p. 1659, 28 - p 1661, 21-10

In Notice of Appeal, Appellate Counsel predecessor Michaeline Murphy listed these threats against George Lane to be presented on appeal but Atty Molly Husky who replaced her failed to present this substantial issue

Prosecutors remarks in closing were

IAC Appellate Counsel

highly prejudicial, consisting of lies, half truths, information not in evidence and demeaned Barcella's witnesses, defense and attorneys. T.p. and

T.p. 1861, 28 - p 1862, 41-3 where prosecutor's holding up a 9x12 photo of Barcella contending what a murderer looked like

Trial counsel thought improper closing remarks by Prosecution Improper enough to enter into motion for New Trial / Acquittal

Counsel on Appeal Michaeline Murphy also listed Improper closing Remarks by Prosecutors in Notice of Appeal.

The only mention of Improper closing remarks was in Barcella's ~~motion~~ ^{petition} for Review by Supreme Court. No cites or follow-up information was included.

The following improprieties occurred in closing but not limited to:

Prosecutors lied Agriolo testified Barcella told him he (Barcella) wiped off the door-knob to Smith's room T.p. 1751, 421-25

Prosecutors lied Barcella's witnesses didn't recognise him T.p. 1762, 412-13 and Barcella

IAC Appellate Counsel

Changed his appearance to deceive the jurors
T.p. 1762, 49-11 Weight was lost due to jail diet.

Prosecutors lied Barcella had prior knowledge
of the crime T.p. 1746, 414-22 despite fact
Barcella saw the crime scene just previously
when Bill Smith's body was found

Prosecutors bolstered false testimony of
Kenneth Thrift T.p. 1742 41-11

Prosecutors lied Barcella confessed to Bobo
over the phone even though the murder couldn't
have yet been committed by Barcella
T.p. 1742, 41-4

Prosecutors called Barcella's defense a "phony
smokescreen defense" T.p. 1759 - p 1760 41-18

Prosecutors contended defense attorneys
lied to jurors T.p. 1743, 43-7

Prosecutors slandered testimony of Barcella's
witnesses T.p. 1761, 420 - p. 1762, 41-2

J.A.C. Appellate Counsel

Prosecutor - improper remarks on limited testimony proffered by Barcella's "character" witnesses T. p. 1761, L. 20 - p. 1762, L. 1-21

The judge limited testimony of Barcella's witnesses under penalty of opening the door to all prior bad acts of Barcella

Also see Prosecutorial misconduct

In excessive sentence portion of appeal Mr Barcella wanted the fact his life expectancy was up to 12 years less than his parole eligibility date as testified to by Dr Logan at aggravation/mitigation hearing ~~Ex~~ Day 2 of Aggravation/mitigation Hearing p. 100, L. 14 - p. 101, L. 1-11

Mr Barcella contends his 5th, 6th, 8th and 14th Amendment rights were violated by ineffective assistance of counsel

I.A.C. Appellate Counsel

Appellate Counsel should have raised issue of Judge denying defendant to jury verdict form which would have given the jury a clear and unequivocal guilty verdict of second degree murder whereas the prosecution's second degree murder verdict instructions are not clear and concise

T.p. 1700 L7 - p 1777, L1-12

1 IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT
2 OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

3 * * * * *

4

5 STATE OF IDAHO,

6 Plaintiff,

7

vs.

Case No. CRF 96-03185

8 GERALD ANGELO BARCELLA,

MOTION FOR NEW TRIAL/
MOTION FOR JUDGMENT OF ACQUITTAL

9

Defendant.

10

AT: Kootenai County, Coeur d'Alene, Idaho

11

ON: February 20, 1998

12

BEFORE: The Honorable John H. Bengtson

13

APPEARANCES:

14

For the Plaintiff: Office of the Kootenai County
Prosecuting Attorney

15

By: Lansing Haynes
Chief Deputy Prosecuting
Attorney

16

501 Government Way
Coeur d'Alene, ID 83814

17

18

For the Defendant: Office of the Kootenai County
Public Defender

19

By: John M. Adams
Public Defender

20

500 Government Way
Coeur d'Alene, ID 83814

21

and
Tim Gresback

22

Attorney at Law
111 N. 2nd

23

Coeur d'Alene, ID 83814

24

25

| | | | | |
|----|------------------------|--------|--------|-----------|
| 1 | I N D E X | | | |
| 2 | PLAINTIFF'S WITNESSES: | DI | X | REDI RE-X |
| 3 | 1. Bergh, Charles F. | 1818-1 | 1825-1 | |
| 4 | | | | |
| 5 | DEFENDANT'S WITNESSES: | | | |
| 6 | (None) | | | |
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1 EXHIBITS

2 PLAINTIFF'S EXHIBIT NO. OFFERED ADMITTED

3 (None)

4

5 DEFENDANT'S EXHIBITS: OFFERED ADMITTED

6 Defendant's Motion Exhibit

7 No. A Receipt for tapes 1863-8 1864-8

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Page 1804

1 IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT
2 OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI
3
4
5 STATE OF IDAHO,
6 Plaintiff,
7 vs. Case No. CRF 96-03185
8 GERALD ANGELO BARCELLA, MOTION FOR NEW TRIAL/
9 Defendant. MOTION FOR JUDGMENT OF ACQUITTAL
10
11 AT: Kootenai County, Coeur d'Alene, Idaho
12 ON: February 20, 1998
13 BEFORE: The Honorable John H. Bengtson
14 APPEARANCES:
15 For the Plaintiff: Office of the Kootenai County
16 Prosecuting Attorney
17 By: Lansing Haynes
18 Chief Deputy Prosecuting
19 Attorney
20 501 Government Way
21 Coeur d'Alene, ID 83814
22 For the Defendant: Office of the Kootenai County
23 Public Defender
24 By: John M. Adams
25 Public Defender
500 Government Way
Coeur d'Alene, ID 83814
and
Tim Gresback
Attorney at Law
111 N. 2nd
Coeur d'Alene, ID 83814

1 PROCEEDINGS FEBRUARY 20, 1998, 1:30 P.M.
2 THE COURT: The next matter to come before the
3 Court is State of Idaho versus Gerald Angelo Barcella,
4 Kootenai County Case CRF 96-3185. This being the time
5 fixed for hearing of defendant's Motion for New Trial or,
6 in the alternative, Motion for Judgment of Acquittal.
7 For the record, is Mr. Barcella present in
8 court?
9 MR. ADAMS: Yes, sir, he is present in custody.
10 THE COURT: I recognize him, of course, but I
11 want to get it on the record.
12 Mr. Barcella has with him his counsel, Mr. John
13 Adams and Mr. Tim Gresback.
14 Representing the State of Idaho in this
15 afternoon's proceedings are Deputy Prosecuting Attorney
16 Lansing Haynes. Mr. -- Who will present the argument on
17 the motion?
18 MR. ADAMS: I will, your Honor.
19 MR. HAYNES: Your Honor, would the Court allow
20 some brief testimony from Captain Bergh from the police
21 department to supplement the record with respect to some
22 of the written allegations by the defendant in the
23 motion?
24 THE COURT: Let's hear first -- let's hear the
25 argument first of Mr. Haynes -- excuse me, Mr. Adams.

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1 INDEX
2 PLAINTIFF'S WITNESSES: DI X RECI RE-X
3 1. Bergh, Charles F. 1818-1 1825-1
4
5 DEFENDANT'S WITNESSES:
6 (None)
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1 MR. ADAMS: Thank you, your Honor. The motion
2 was a pretty generic motion and it cited all of the
3 grounds upon which a trial judge can grant a new trial.
4 And subsequent to that, we did file a memorandum in
5 support of the motion. I know the Court has received
6 that, and I talked to Landy, and I believe Mr. Haynes has
7 received it. And I think it's pretty clear from the
8 memorandum that although we did kind of did a boiler
9 plate motion, that really what we are arguing about are
10 errors of law that I believe occurred. And we are not
11 asking the Court to grant us a judgment of acquittal.
12 We'll go ahead and leave that. We are not going to argue
13 that one. I'll tell you that.
14 But, the grounds we are asking for new trial are
15 on errors occurring. And we all know that our Courts of
16 Appeal have ruled in the '90s now that in the interest of
17 justice it's not a ground for a new trial, but they are
18 the ones listed in the statute and the rules. So, we'll
19 be relying on that.
20 THE COURT: You've got six specific grounds that
21 have precis in my notes, so I think I pretty well
22 understand what those grounds are. And I assume you are
23 going to take them one at a time now.
24 MR. ADAMS: Yes, your Honor.
25 THE COURT: All right.

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Page 1806

1 EXHIBITS
2 PLAINTIFF'S EXHIBIT NO. OFFERED ADMITTED
3 (None)
4
5 DEFENDANT'S EXHIBITS: OFFERED ADMITTED
6 Defendant's Motion Exhibit
7 No. A Receipt for tapes 1863-8 1864-8
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1 MR. ADAMS: The major one and I think the one
2 that really mandates a new trial here was that testimony
3 of George Lang (sic) that Gerry Barcella had twice before
4 killed people and gotten away with it and therefore he
5 felt he could do it again. I know this is really
6 redundant and lawyers are taught and judges tell us all
7 the time quit repeating yourself. But, Judge, I just
8 can't stress strongly enough how I feel about that making
9 the trial unfair.
10 I mean, I looked at the jury when they heard
11 that and that was it. The trial was over. Literally, the
12 trial was over when they heard George Lang (sic) say that
13 Gerry Barcella admitted two prior killings and that he
14 gotten away with it before and was confident he could do
15 it again.
16 THE COURT: What was the exact language? We
17 don't extra transcript. My notes indicate that he had
18 said he had two prior shootings -- I don't recall whether
19 it was killings -- and that he had gotten away -- he,
20 Mr. Barcella, allegedly said, according to Mr. Lang (sic)
21 that, he, Barcella, had been involved in two prior
22 shootings and he hadn't been convicted of either one and
23 that -- let's see, it went on to say and that he
24 therefore didn't believe that they'd nail him on this
25 one, basically. That's what I understood the language to

1 be.

2 MR. ADAMS: I believe the Court is correct. And
3 I think Lang's (sic) testimony at trial was substantially
4 identical to his responses in the pretrial interviews,
5 and I believe the Court was provided with a transcript of
6 that. And I believe the Court is correct, the exact
7 wording was very similar to he had done two prior
8 shootings and gotten away with it. And I don't think
9 there was talk about -- it may have been that he went to
10 trial and got acquitted, but my recollection, and of
11 course the transcripts recall, that he had gotten away
12 with two prior shootings, just plain gotten away with it,
13 hadn't been caught, and thought that he could get away
14 with this one too.

15 THE COURT: Doesn't that constitute some
16 consciousness of guilt on Mr. Barcella's part to make a
17 statement like that? Now, I realize, Mr. Adams, and I
18 recall that I had said, well, you opened it up, the
19 defense opened it up on their opening statement. And
20 there is a doctrine that saves a lot of judges' fannies,
21 and that is that sometimes, if the result is right, you
22 get the right result but using the wrong theory. And it
23 appeals to me, or it appears to me, that these statements
24 by Mr. Barcella were an indication of his guilt. This
25 wasn't offered as character evidence. There was no

1 It's the state's burden, if they want to bring up the
2 prior bad act, to say what it is and give us notice and
3 an opportunity to be heard on that. And I believe Judge
4 Haman's ruling was, well, if you guys have got some prior
5 bad acts you'd better give it to the defense, and if the
6 defense doesn't want it brought back out, I'll hear your
7 motion again. And that's how it was left.

8 So, if you look at this as analogous to flight
9 evidence, I believe that would have been covered by our
10 pretrial motion and Judge Haman's pretrial ruling. That
11 is, if that's a prior bad act, that I've done these
12 shootings so I've made this statement admitting to these
13 shootings, that should have been noticed up by the state
14 for hearing outside the presence. And the state should
15 have said I plan to elicit from this witness that
16 Mr. Barcella admitted to these require bad acts. And
17 then we would have been able to argue. But that wasn't
18 done.

19 So that would have been -- even if the state had
20 purposely elicited to that as analogous to flight
21 evidence, that would have been a violation to those
22 pretrial rulings and pretrial motions. And that's why
23 defense lawyers bring pretrial motions like that, is to
24 avoid surprise at trial, so everybody is playing on an
25 equal ground and we all know the rules. We don't try

1 question of reputation. This is something your client
2 said to a fellow inmate, and apparently the jurors
3 believed Mr. Lang's (sic) testimony. But this was not a
4 matter of dealing with character or reputation. It was
5 like flight, in a sense, in my thoughts, a consciousness
6 of guilt. Now that concerns me about this.

7 And, gentlemen, as of this moment, I do not
8 intend to rule from the bench. This is going to take me
9 some more time. Go ahead.

10 MR. ADAMS: I understand. It's a big decision
11 in the case. You know, a couple of things under remarks,
12 your Honor. First of all, your remarks assume Mr.
13 Barcella really did say that. Of course, we deny he said
14 it. And given your instruction to the jury that they
15 were to disregard that, of course, I couldn't
16 cross-examine Lang (sic) on that because that would be
17 kind of waiving any error. So the fact is we did not
18 cross-examine him on that and a presumption that in fact
19 Barcella did say that to Lang (sic) therefore, I think,
20 is an invalid assumption.

21 Secondly, you know, when we made the motion, you
22 did rule, your Honor, that the reason you were denying
23 the motion was because you felt the door had been opened
24 to character witness, and there was never any ruling or
25 any discussion at that time that this could have been a

1 people by ambush. We are all supposed to know what's
2 what going in. There are not supposed to be surprises
3 like that.

4 THE COURT: I recognize Rule 801(d)(2), or
5 whatever, deals with statements of a party opponent.
6 And they don't constitute -- those statements are not
7 hearsay. Now, if the state had some evidence to the
8 effect that Mr. Barcella had indeed committed prior acts,
9 independently of the defendant himself saying I did this,
10 then I think there's a real problem here. But where the
11 defendant says, hey, I have done this before, two
12 shootings before -- I don't know whether they ended up in
13 deaths or not. But it seems to me that statements of the
14 defendant ought to be admissible. It is against his own
15 interest. He is the one that brought it up. It's not
16 some conduct of somebody else.

17 MR. ADAMS: I understand the Court's position.
18 My position would still be that that's 404 evidence that
19 was covered by our pretrial motion and pretrial ruling.
20 And the bottom line is the state never offered that as
21 statement of a party opponent evidence. Mr. Haynes said
22 that he was surprised by the witness's statement that,
23 although he had the transcript and he knew that the
24 statement had been made, those claims had been made by
25 the witness in pretrial statements to the police, he was

1 guilty knowledge sort of evidence. All I can do is argue
2 based upon the rulings and the law that we all argued at
3 the time.

4 The other thing on that, regardless of whether
5 the Court or the lawyers in hindsight would look at that
6 as analogous to flight evidence, we filed, prior to
7 trial, and it was heard by Judge Haman before the Supreme
8 Court appointed you, your Honor, to keep any bad acts
9 out. And at the time we argued that motion, I believe it
10 was in September of last year, we argued to the Judge and
11 hopefully I am not misrepresenting the record, and I
12 wouldn't do that on purpose -- we argued to the Court
13 that we believed there were prior bad acts that Gerry had
14 committed that the state was aware of. Got in a fight
15 with a guy in Wallace, had some bird guns in his room
16 when he was a convicted felon, some things like that, and
17 we asked that the state not be allowed to bring up prior
18 bad acts without adequate notice and opportunity to be
19 heard on that.

20 And at the hearing, Judge Haman said what prior
21 bad acts do you want to be kept out. And we said we
22 don't know which ones the state will try to bring in. I
23 am not going to sit here and give away confidences of my
24 client and tell them all the prior bad acts I may know
25 about. Whether I did or not, I'm not going to say that.

1 surprised at that response. That was not the response
2 that he had anticipated from his question. So,
3 therefore, I think it begs the question whether this
4 could have been offered as -- legitimately offered and
5 received as a statement against interest, since it was
6 not. And I don't think Mr. Haynes ever claimed that at
7 the time, and I think it would be less ingenious to claim
8 it now.

9 THE COURT: Is it your client's position then
10 that this statement by Mr. Lang (sic) was a surprise to
11 the prosecuting attorney? He didn't intend to elicit
12 that?

13 MR. ADAMS: I think that was my understanding
14 from Mr. Haynes' statements at the time, that although he
15 knew that Lane had made that claim that when Mr. Lane
16 gave the testimony, the testimony was the surprise to
17 Mr. Haynes, because he hadn't expected that response.
18 Even though he knew that that was a response that
19 Mr. Lang (sic) had given in the past that, in front of
20 this jury he hadn't expected Lang (sic) to state that for
21 the third time, even though he had already stated it
22 twice in pretrial statements. That was my understanding
23 of Mr. Haynes' argument at the time.

24 And I believe he also stated to the Court that
25 he had not spoken to this witness about this witness's

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1 testimony and cautioned the witness and say look it, I am
 2 going to ask you this question and you gave these
 3 responses about these prior bad acts, you are not to do
 4 that in front of the jury unless and until we have a
 5 hearing and ask the Judge to allow that. So don't do it
 6 unless somebody has told you that you can. And Mr.
 7 Haynes admitted he did not do that.
 8 THE COURT: So, as a practical matter what your
 9 contention is that I should have then told the jurors to
 10 just disregard that?
 11 MR. ADAMS: I think what you should have told
 12 them was thank you for your time, you can pack up and go
 13 home, because this trial is fundamentally tainted now.
 14 We have to bring in another panel. I am not trying to be
 15 a wise guy with you, Judge. But that's what I believe
 16 you should have done.
 17 I honestly think there was no way there was
 18 going to be any verdict other than guilty after the jury
 19 heard this witness, who they knew we were arguing about
 20 whether he could testify, they knew that you had ruled he
 21 was a legitimate witness and he could testify and get up
 22 there and say, hey, he has done two shootings in the past
 23 and gotten away with it.
 24 And even though the Court steadfastly and
 25 correctly admonished the jury to disregard any publicity,

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1 the press that day was that public defender complains
 2 about prior bad acts of Barcella coming into trial. The
 3 presumption in the press was -- the assumption in the
 4 press was these prior shootings, these bad acts were
 5 fact, were true, and that they had come out in trial in
 6 front of the jury and that the public defender was upset
 7 about that. There was nothing in that press coverage
 8 that indicated those statements by the witness may not be
 9 true, that there may be two sides to the story.
 10 And, of course, I can't place before you any
 11 affidavits of jurors to impeach their verdict, but I am
 12 pointing out that regardless of how much we admonish
 13 jurors, I think it is a practical experience, we are all
 14 experienced enough to know, boy, sometimes they do look
 15 at the coverage, and that coverage was prior bad acts of
 16 Barcella come out in trial, alleged prior bad acts.
 17 THE COURT: So, I am then to assume the jurors
 18 did not follow my instructions to avoid reading anything
 19 in the newspaper?
 20 MR. ADAMS: No, I can't argue that to you,
 21 Judge.
 22 THE COURT: I thought that's what you were
 23 arguing.
 24 MR. ADAMS: No. I am just pointing out that even
 25 though you admonish the jury to disregard that, we have

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1 people sitting here in the press that hear the arguments
 2 that know these are allegations that the defense is
 3 saying are not true, for one thing, that should not have
 4 been told to the jury, and yet the press, ostensibly an
 5 objective witness there reports it and gets it all wrong
 6 and gets it as a fact. Now, if trained objective
 7 observers whom we assume the press to be, and I don't
 8 know if that is a valid assumption, but even if they get
 9 it wrong, how can we expect a juror that hasn't heard the
 10 whole 100 percent of sides of the thing --
 11 THE COURT: You might ask President Clinton. I
 12 don't mean to be facetious. Okay. I understand.
 13 MR. ADAMS: By analogy, if a trained observer
 14 can't get it right, who had heard the whole side of it,
 15 how can we expect a juror who has only heard a very small
 16 portion of it to get it right? And that was the major
 17 basis, I think the major error in this trial was that
 18 evidence coming in. And you cannot unring the bell like
 19 this guy who was charged with hitting an old man with an
 20 ax, has violated people in the past and gotten away with
 21 it, you cannot unring that bell. There is no way that
 22 jury was going to take a chance on letting him get away
 23 with a third one.
 24 You can tell them until you are blue in the
 25 face, put that testimony out of your mind. I just don't

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1 think that is fair to a capital defendant to trust the
 2 jury to do that. I think what's fair is to trust the
 3 jury to hear only the evidence which should be admissible
 4 so that we don't take a chance. The heightened scrutiny
 5 in these capital cases is a fundamental basis of our due
 6 process. It's being reiterated by our U.S. Supreme Court
 7 time and time again that capital cases require your extra
 8 fairness, and that's exactly what they say. The strictest
 9 scrutiny goes into the fairness of these types of
 10 trials.
 11 And, for the life me, I can't see how it would
 12 be a fair trial when that evidence which should not have
 13 come in, and the ruling was it should not have come in. I
 14 think the state conceded it should not have come in. Once
 15 it did come in, the trial wasn't fair anymore, Judge.
 16 I think the rest of our arguments are pretty
 17 well laid out in our memorandum, and I won't insult the
 18 Court by repeating what you already have in writing.
 19 Thank you, Judge.
 20 THE COURT: Thank you, Counsel.
 21 MR. HAYNES: Your Honor, at the Court's pleasure
 22 I could respond to this specific issue or I could put my
 23 testimony on regarding the issues that are in the
 24 memorandum, as the Court pleases.
 25 THE COURT: Well, what objection, if any, would

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1 you have to this new evidence being presented here? You
 2 have been given notice that the state might call --
 3 MR. ADAMS: Well, no, I haven't, Judge. Of
 4 course, you have the discretion to do that. I would
 5 object since they didn't give us notice, didn't give us
 6 an opportunity to prepare for that, so I won't object to
 7 that.
 8 THE COURT: I would be most happy then to
 9 continue this hearing to a later date so you have an
 10 opportunity to discover, as best you can, what might be
 11 coming up through this new evidence.
 12 MR. ADAMS: I don't know what the schedule is
 13 like today, Judge. If Mr. Haynes wants to make some
 14 argument and if you have time for a recess and he can
 15 tell me what it is.
 16 THE COURT: I have all day. I really want to get
 17 my wife home, because I'm sure she is shopping while I am
 18 here now. But --
 19 MR. ADAMS: If you have the time to let me have
 20 a recess and let me talk.
 21 THE COURT: I am willing to take a break right
 22 now and if I don't hear anything in 15 minutes from you
 23 gentlemen, I'll come back in and say okay, let's get the
 24 show on the road. We are in recess then for 15 minutes.
 25 Good enough.

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1 (Recess)
 2 THE COURT: Court is again in session in the
 3 matter of State of Idaho versus Barcella. The record
 4 will reflect that the defendant, his counsel, and the
 5 state's attorney are present at this time. Mr. Adams.
 6 MR. ADAMS: I believe we are ready to proceed.
 7 We have spoken with the state during the recess, and we
 8 believe we are no longer prejudiced by the failure to
 9 notice and we are prepared to go forward.
 10 THE COURT: Then you have no objection to
 11 Mr. Haynes calling Captain Bergh?
 12 MR. ADAMS: That's correct, your Honor.
 13 THE COURT: Sir, if you would come forward
 14 please. You were sworn initially in the trial of this
 15 case, but we will do it again for you. The clerk will
 16 administer the oath to you.
 17 CHARLES F. BERGH,
 18 called as a witness at the request of the
 19 Plaintiff, being first duly sworn, was
 20 examined and testified as follows:
 21 THE COURT: Captain Bergh, state your full name,
 22 please.
 23 THE WITNESS: My name is Charles F. Bergh, and
 24 last name spelled B-E-R-G-H.
 25 THE COURT: With an H on the end, thank you.

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DIRECT EXAMINATION

1 BY MR. HAYNES:

2 QJust real quickly, for the record, please state
3 your occupation and your rank and duties in that
4 occupation?

5 A I am employed by the City of Coeur d'Alene as a
6 police officer. I hold the rank of captain, and I am
7 currently in charge of what's referred to as support
8 services division of the police department and that
9 includes, in part, the investigative section.

10 QDid you happen to supervise the investigation of
11 the homicide of William Smith that Gerald Barcella was
12 charged with and convicted of?

13 A Yes.

14 QIn that supervision are you aware of a tape
15 recording of a conversation with one Rikki Bobo that
16 occurred April 11, 1995?

17 A Yes.

18 QDo you have knowledge as to whether the tape
19 recording itself of that conversation was ever delivered
20 to a business in Coeur d'Alene for the purpose of copying
21 for the defense?

22 A Yes.

23 QHow many tape recordings in total were delivered
24 to the business in Coeur d'Alene?

1 AIn total of four bags containing what's listed
2 as 21 tapes.

3 QAnd what was the name of the business that these
4 tapes were delivered to?

5 A Business name is Steinley's.

6 QYou might spell that for the record?

7 A I believe it's spelled S-T-E-I-N-L-E-Y-S.

8 QDo you have personal knowledge or do you have
9 knowledge that you have come to as to whether the April
10 11 interview with Rikki Bobo was one of those tapes in
11 the four bags that were delivered?

12 A Yes.

13 QDuring the trial in State versus Barcella, did
14 you have occasion to go back to Steinley's to determine
15 whether the public defender's office had picked up all of
16 the copies of the tapes that you had delivered?

17 A Yes.

18 QDo you remember who you spoke with in
19 determining whether the public defender's office had
20 picked up those tapes?

21 A I spoke with a gentleman by the name of Ed Kimm,
22 it's K-I-M-M. There was also another individual there,
23 and I don't recall his name at the current time.

24 QDid either of those individuals talk to you --
25 or I'll ask it in a more general sense. What did you

1 learn about whether the public defender's office had
2 picked up all of the tapes that you had delivered?

3 MR. ADAMS: Objection, your Honor. Calls for
4 hearsay.

5 MR. HAYNES: Your Honor, I'm not sure that the
6 rules of evidence are strictly applicable in these
7 proceedings and I think this is an augmentation of the
8 record for motion purposes.

9 THE COURT: I'll overrule the objection.

10 QBY MR. HAYNES: What did you learn as to whether
11 the public defender's office had picked up all of the
12 tapes that you had delivered?

13 A I was assured by those two gentlemen that all
14 the tapes had been copied and that the copies were given
15 to the public defender's office and that a representative
16 had signed for them. They showed me a receipt they
17 indicated reflected that had taken place.

18 QIn that receipt did it specifically indicate the
19 number of tapes that the public defender's office had
20 signed for asserting receipt of the tapes?

21 A Yes, sir.

22 QAnd how many tapes, do you recall?

23 A I don't recall the specific number, but I
24 believe it was the approximate number or -- I believe it
25 was 21, but I can't say with a certainty. I don't have

1 the document in front of me.

2 QWhen you looked at it during the trial of State
3 versus Barcella, did you know how many tapes had been
4 delivered to Steinley's by your office?

5 A Yes.

6 QDid you have any reason to believe at that time
7 to believe that any fewer tapes had been signed for by
8 the public defender's office?

9 A No.

10 QThere was an allegation that the prosecution in
11 its responses to discovery had delivered only a partial
12 transcript of this April 11, 1995, tape recording of
13 Rikki Bobo to the public defender's office. Can you
14 explain, as the supervisor of that division, how our
15 office came to have half or a partial transcript of that
16 tape recording?

17 A Yes.

18 QPlease do for the Court.

19 A The secretary that was transcribing that tape
20 transcribed the second side apparently initially. And
21 copy was provided to me and put in the initial case
22 file. She apparently discovered that she had not
23 transcribed the first side. She made the corrections,
24 sent the original documents to our records division, did
25 not provide me with a copy of the first side of the

1 transcript, so I only had the second side. And when I
2 delivered the case to your office, then only that second
3 side transcript was included with the documents that I
4 delivered to your office.

5 THE COURT: Excuse me, Mr. Haynes. Counsel, for
6 the defendant.

7 MR. ADAMS: Yes, sir.

8 THE COURT: Is it still your position that you
9 didn't get copies of those tapes, or are we waiting for
10 that receipt?

11 MR. ADAMS: We are waiting for that receipt,
12 Judge.

13 QBY MR. HAYNES: When did you discover personally
14 that there was in fact an accurate transcript of THE
15 April 11 conversation as opposed to just the second side?

16 A During the trial.

17 QState versus Barcella?

18 A That's correct.

19 QHow could the federal public defender in the
20 summer of 1995 have been able to obtain both sides 1 and
21 sides 2 transcripts of this tape without it coming to
22 your knowledge?

23 A The federal public defender's office got a copy
24 of those documents from our records division. The
25 original transcription had been sent by the secretary to

1 the records division and therefore they existed in that
2 office.

3 QThe records division, are the records that are
4 in the records division, are those a separate facility
5 from where your office is and your case file is?

6 A Yes, sir.

7 THE COURT: Again, Mr. Haynes, I've got some
8 concern. I read the affidavit of Caleb -- is that his
9 name?

10 MR. ADAMS: Gabe Caballero.

11 THE COURT: Okay. Who was with the public
12 defender's office, the federal -- North Idaho and Eastern
13 Washington, that outfit. There was a case mentioned in
14 that affidavit. What was the nature of that case, if
15 anybody knows? Why did the public defender's office
16 apparently get --

17 MR. ADAMS: That was a federal firearms charge
18 that we always talk about.

19 THE COURT: That answers my question, thank you.

20 MR. HAYNES: I don't have any other questions of
21 Captain Bergh.

22 THE COURT: Do you have any other questions of
23 Captain Bergh, Mr. Adams?

24 ////

25 ////

CROSS-EXAMINATION

1 BY MR. ADAMS:
 2 Q.Captain, you just heard the Judge refer to the
 3 affidavit of Gabe Caballero. Are you familiar with him
 4 as being with the federal public defender's office,
 5 correct?
 6 A.I know that there was an investigator I believe
 7 that worked for Ruben Iniquez, whose name, I believe, was
 8 Gabe.
 9 Q.I assume for purposes of my questions that that
 10 is the investigator who worked with the attorney Ruben,
 11 both of the federal defender's offices, and they
 12 represented Gerry on those firearm charges that we talked
 13 about during trial. Have you read Gabe's affidavit
 14 declaration that is attached to the motion?
 15 A.No, sir.
 16 MR. ADAMS: May I approach, Judge?
 17 THE COURT: Certainly.
 18 BY MR. ADAMS: I am going to show you the
 19 declaration of Gabe Caballero. Would you read that and
 20 tell me when you are finished, please.
 21 Are you finished with that, Captain?
 22 A.Uh-huh.
 23 Q.Is that a yes?
 24 A.Yes.

1 Q.Do you disagree with anything in this
 2 declaration?
 3 A.I don't know that I can. I am not familiar with
 4 that case in any detail. I don't see anything that I --
 5 Q.I understand it was your testimony in response
 6 to Mr. Haynes' questions you folks basically assumed that
 7 in fact the federal public defenders did receive a full
 8 transcript of Bobo's April statement. Do you agree with
 9 that, that they did receive the full transcript?
 10 A.I'm assuming that they did receive a full
 11 transcript. I did not prepare it for them. I did not
 12 deliver it to them.
 13 Q.But you have no reason then to doubt
 14 Mr. Caballero's sworn statement that they received a full
 15 transcript?
 16 A.No, sir.
 17 Q.And to the best of your knowledge, in fact, your
 18 department did make a full transcript, correct?
 19 A.My records division, I believe, would have made
 20 that, if they had a full transcript, yes, sir.
 21 Q.And that's the records division of the Coeur
 22 d'Alene Police Department?
 23 A.Yes, sir.
 24 Q.Okay. And do you recall when this issue came up
 25 in this trial, do you recall that?

1 A.Yes, sir.
 2 Q.And we have been examining Rikki Bobo, both
 3 sides had, with a transcript that wasn't dated, and we
 4 had been referring to it as the undated or unknown dated
 5 transcript, correct?
 6 A.Correct.
 7 Q.And, in fact, that was because we only had a
 8 partial transcript. And the transcript we did not have
 9 had the date on it, correct?
 10 A.Correct.
 11 Q.And when you folks found out that you didn't
 12 have the full transcript, you came in the next day and
 13 told the Judge that you just discovered it and therefore
 14 had just made the transcript the evening before, correct?
 15 A.No, sir.
 16 Q.Okay. Well, I guess the record will speak for
 17 itself, but if it was told to this Judge that a
 18 transcript had never been made before that evening, that
 19 would be incorrect, wouldn't it?
 20 A.Yes.
 21 Q.Because the transcript was made back in 1995,
 22 wasn't it?
 23 A.Yes.
 24 Q.And it was available to the prosecutor had he
 25 gone and looked through the police department's files in

1 this case, correct?
 2 A.Correct.
 3 Q.And do you have personal knowledge or personal
 4 recollection whether that specific tape, we are talking
 5 about, the Bobo tape that did not get transcribed for
 6 us -- whether that specific tape had ever been given to
 7 Steinley's by your department? Do you have personal
 8 knowledge of that?
 9 A.Yes.
 10 Q.Tell us how you have personal knowledge or
 11 personal memory.
 12 A.In the first bag before that I took there's a
 13 reference to 16 audio tapes and one larger audiotape, I
 14 believe is the reference on there. I personally checked,
 15 and one of those 16 audio tapes is a full side 1, side 2
 16 of that particular interview and does exist.
 17 Q.And you personally recall now that you took that
 18 tape with both side 1 and 2 to Steinley's?
 19 A.I took that bag that number of tapes in it.
 20 That number of tapes which includes that particular
 21 interview was returned with me with all those tapes
 22 present, and during the trial I checked and in fact all
 23 those tapes exist in that evidence bag.
 24 Q.And my office is looking for a copy of that
 25 receipt to which you have alluded. My understanding is

1 you do not have a copy of that, is that correct?
 2 A.I do not have a copy of it. There may be a copy
 3 that has since been sent to the original case file
 4 records. I don't have a copy of it today. I did not have
 5 one in my office, which is not at City Hall that I could
 6 locate this morning.
 7 MR. ADAMS: Thank you, Captain. I don't have
 8 any other questions. I can tell the Court and counsel
 9 that I believe my office manager now has been informed of
 10 the proper place to look for that receipt and has gone
 11 back over to try to find it.
 12 THE COURT: Any additional questions?
 13 MR. HAYNES: No other questions.
 14 THE COURT: Step down, Captain Bergh, or step
 15 over, I guess.
 16 The concern here is not that you -- that the
 17 defendant didn't get a copy of the interview but didn't
 18 get a copy of the tapes? Is that --
 19 MR. ADAMS: I think there are two issues here,
 20 Judge. I think the state is agreeing that they never
 21 gave us a transcript of side 1 of that interview, and
 22 that's why throughout the trial when we showed Bobo the
 23 transcript it was only of side 2 and nobody knew the date
 24 of that. I think, Landy, you are conceding that, right?
 25 MR. HAYNES: (Nods head)

1 MR. ADAMS: Is that yes?
 2 MR. HAYNES: Yes.
 3 MR. ADAMS: Let the record reflect Mr. Haynes
 4 said yes. The other issue is I think the state is
 5 claiming regardless of that, they provided us with a copy
 6 of a cassette tape that had that interview on it, even
 7 though they didn't provide us the transcript. That's
 8 what I understand the issue is. I am not at will to say
 9 yea or nay whether we got a copy of that cassette tape
 10 until I see the receipt.
 11 The other issue there was, I believe, that
 12 Mr. Haynes told you that the thing had never been
 13 transcribed, and yet the federal defenders have the
 14 transcript from the Coeur d'Alene Police Department in
 15 1995. So I think that is maybe even a third issue.
 16 THE COURT: Well, does the state have the burden
 17 of providing you written transcripts or merely making the
 18 tapes available to you? What is your position on that?
 19 MR. HAYNES: My position, your Honor, is that we
 20 have the burden of providing whatever we have to the
 21 defense. And in this issue that we assert that we
 22 provided both the tape and side 2 of the tape. We had
 23 the tape and side 2 transcribed only. We provided what
 24 we had.
 25 MR. ADAMS: I think also under Kyles versus

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1 Whitley the holding areas that the state has an
2 affirmative obligation to go through the police file and
3 look and see if they have given us everything. And
4 Captain Bergh's testimony, together with Mr. Caballero's
5 affidavit, I think, pretty firmly establishes that that
6 transcript did exist and in fact existed at Coeur d'Alene
7 Police Department and was never given to the defense in
8 this case.

9 So, it is the defense position that if indeed
10 the state had made the tapes themselves available to you,
11 the state nevertheless did not fulfill its obligation.
12 It should have provided you with a written transcript; is
13 that what you are saying?

14 MR. ADAMS: That's correct, your Honor. We
15 asked for it and in fact they had it.

16 THE COURT: All right. If the tapes had been
17 made available to you, you would have had the opportunity
18 to listen to them and to make a transcript of it?

19 MR. ADAMS: Sure sounds like a pretty reasonable
20 finding to me.

21 THE COURT: So it all boils down, it seems to
22 me, on this issue whether or not defense got copies of
23 the tapes. And we are awaiting word as to whether or not
24 you did?

25 MR. ADAMS: Yes, sir. I think we can go forward

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1 with our hearing and hopefully we will get that receipt
2 over here soon.

3 THE COURT: Okay.

4 MR. HAYNES: Your Honor, I think I'll respond,
5 if the Court allows, to the issue about the Lane
6 testimony about the two shootings first, and then I'll go
7 back and respond to those items in the memorandum. First
8 of all, I'd ask the Court to-- that Mr. Adams's
9 perception of what the facial expressions of jurors were
10 at the time of the Lane testimony is not in any kind of
11 issue for the Court to determine. That's open to just
12 any number of interpretations. That's meaningless.

13 Your Honor, the state did not consciously and
14 intentionally elicit the testimony from Mr. Lane that the
15 defendant had made statements about two prior shootings.
16 And I'd like to point out that the defendant's, I think,
17 hyperbole to some degree shows the strength of their
18 argument. Right in their written motion they assert Lane
19 testified that the defendant had twice before committed
20 murder and got away with it. In oral argument today they
21 assert he admitted to two prior killings and got away
22 with it. And the Court, I think correctly pointed out it
23 was two prior shootings and had gotten away with it. And
24 I think that it is important that state didn't
25 consciously adduce that evidence as we argued at the

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1 trial when the issue came up from the transcript of
2 George Lane's interview he was asked the question about
3 whether the defendant believed he was going to be
4 convicted. Lane's response was no, because nobody can
5 put me in that room. And then a collateral response
6 after that response is I've had two prior shootings under
7 my belt and got away with it.

8 And the state, when we delivered a transcript of
9 that statement to Mr. Lane, we told him we are going to
10 question you right from that transcript. And so my
11 belief when I asked that question was that Mr. Lane's
12 answer was going to be that the defendant said no, he did
13 not believe he would be convicted because nobody could
14 put him in that room.

15 Nevertheless, Mr. Lane testified that the
16 defendant said he did not think he would be convicted
17 because he had two prior shootings under his belt. And
18 that was a surprise. We didn't put that forward on
19 purpose. And I think the Court's assessment of it at the
20 time was correct, that that was to some degree
21 prejudicial evidence against the defendant but --

22 THE COURT: Well, I guess any evidence against
23 the defendant is prejudicial. The question is was it
24 unfairly prejudicial.

25 MR. HAYNES: Exactly, and the Court pretty much

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1 analyzed it in that regard with respect to the fact that
2 defendants in their case of the defense was already
3 asserting, of their own volition, that Mr. Barcella was a
4 convicted felon, that he had firearms in his room, that
5 he was in jail for being a felon with a firearm. So, in
6 the totality of the circumstances, that inadvertent
7 testimony by Mr. Lane, or inadvertent evidence, taken in
8 that totality, was not unduly prejudicial. I think the
9 Court has -- conceivably, the state could have
10 consciously gone forward with that evidence and had a
11 good faith evidentiary reason for it, but we didn't. We
12 didn't intend for that evidence to come out.

13 I'd like to also address the defendant's
14 assertion that they had a pretrial motion regarding 404
15 bad acts evidence, and that did come before Judge Haman
16 and that is in the record, and Judge Haman asked the
17 defense side well, what bad acts do you want kept out.
18 And the defense said we don't want to say. We think the
19 state ought to say what they are going to introduce.
20 Well, we didn't seek to introduce any. But,
21 nevertheless, the statement about prior shootings was
22 part of the pretrial discovery to the defense. That
23 issue could have been highlighted by the defense. They
24 could have said, without breaching any client
25 confidentiality, George Lane asserts that my client says

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1 he's got two prior shootings. We don't think that is
2 admissible. And that whole matter could have been
3 litigated in pretrial and it could have been handled, and
4 the defense chose not to do that.

5 THE COURT: Is it possible to furnish me with a
6 verbatim transcript of that hearing regarding limiting of
7 evidence before Judge Haman?

8 MR. HAYNES: Yes.

9 THE COURT: I'd like to have a copy of that if
10 you've got that for me.

11 MR. HAYNES: We will do a motion and order for
12 that.

13 So, for those reasons, your Honor, I think this
14 Court very quickly, in terms of the way it came up at
15 trial, but very succinctly assessed the issue, and I
16 think properly instructed the jury to disregard that
17 matter, and that in the totality of the circumstances it
18 was inadvertent testimony that was not unduly
19 prejudicial, because the defense was already conceding
20 that he was a prior felon and had weapons and was in jail
21 for that. So, the damage was limited to that extent.

22 THE COURT: Thank you. On page 3 of the
23 Memorandum in Support of Motion for a New Trial I am fed
24 the State versus Rupp case, which is a case I had that
25 the Supreme Court -- Court of Appeals said, no, no, no,

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1 you were wrong, Judge Bengtson. There was -- in Rupp,
2 the prosecutor sought to introduce evidence of Mr. Rupp's
3 reputation. And we are not talking about reputation or
4 character evidence. I didn't think we were, in the
5 Barcella trial.

6 MR. HAYNES: Exactly, your Honor. The evidence
7 of Mr. Lane's testifying that the defendant admitted to
8 prior shootings was in no way, first of all, sought to be
9 introduced, but certainly was not character evidence. It
10 was merely the defendant stating his consciousness of
11 guilt and belief that he would not be convicted because
12 nobody could put him in that room. A tacit admission,
13 I'm the killer but they'll never convict me. They'll
14 never prove that I did it. And that was the purpose of
15 the question, and our expected answer was his knowledge
16 and consciousness of guilt. Mr. Adams and Mr. Gresback,
17 suppose -- these hypothetical things I come up with. But
18 suppose that Mr. Lane had not said anything about prior
19 shootings. Suppose Mr. Lane had merely said Barcella
20 told me that they couldn't prove that I was there, so
21 they can't convict me. Now, is there a difference
22 between prior shootings, supposedly stated by
23 Mr. Barcella on the one hand, and the statement by him
24 they can't prove it, nobody can put me there? Is there a
25 difference?

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1 MR. ADAMS: I think that there is such a
2 fundamental difference, and that's why a mistrial should
3 have been declared. Because on the one hand you are
4 saying they can't convict me of doing this crime because
5 nobody saw me commit this crime. There is no witness that
6 I committed this crime. That's one thing. But to say the
7 reason they can't convict me of this murder is because I
8 have done it twice before and gotten away with it, boy,
9 that's like night and day, Judge.

10 THE COURT: I'd like a copy of the transcript of
11 Lane's testimony. My recollection, I have in my notes,
12 and I have three pads of notes taken in the trial, my
13 notes indicate there was something said about shootings
14 but not murders.

15 MR. ADAMS: I agree. I doubt Lane used the word
16 "murder." I think the question was, did Gerry Barcella
17 tell you why he was going to get away with this why he
18 couldn't get convicted of this, and this being the
19 murder. And, yeah, he said he had done two prior
20 shootings and gotten away with it. I think the clear
21 implication there is not that he wounded some guy in the
22 shoulder like John Wayne in a cowboy movie but that he
23 shot two people to death. And Mr. Haynes just now in his
24 argument slipped and in the beginning he started out
25 making a distinction between killing, murder, and

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1 shooting, but in his last statement he said it, two prior
2 killings. And I think the record will reflect that.
3 That's because that was the implication to the answer was
4 he had shot two people to death. That's prior bad acts.
5 There are rules about that. There are very few rules
6 about a witness saying the defendant confessed to me he
7 committed this crime.

8 THE COURT: I can see a difference where someone
9 else, not the defendant, but someone else is called to
10 testify as to prior bad acts. But, an admission of prior
11 bad acts by the defendant I don't think is covered by --
12 I don't think it's barred by our rules.

13 MR. ADAMS: I think it is, Judge. As an
14 example, when a detective interviews a defendant and the
15 reason we picked you on this is because you have twice
16 before molested children, and you've admitted it, and
17 we've got to take care of it. But, boy, this little girl
18 says it was you, and that's why we picked you up. I'd
19 hate to say I expect the Court to agree with me, but I
20 would say if I am trying that case --

21 THE COURT: That's a heck of a lot of difference
22 than --

23 MR. ADAMS: That is two prior bad acts.

24 THE COURT: Well, I understand your position.
25 Mr. Haynes, I cut you off --

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1 MR. HAYNES: Quite all right.

2 THE COURT: -- asking those questions. Please
3 continue.

4 MR. HAYNES: I was through on that particular
5 issue, your Honor. The initial issue or the next one I
6 wanted to talk about was the George Lane testimony
7 regarding the fact that the defendant had been carrying
8 an ax or a hatchet in the evening. I personally and I
9 guess that's --

10 THE COURT: Excuse me, was that --

11 MR. HAYNES: That's page 2 of the memorandum.

12 THE COURT: I had precis these two.

13 MR. ADAMS: Which page?

14 MR. HAYNES: Page 2 at the top all right.

15 THE COURT: All right. Go ahead.

16 MR. HAYNES: Your Honor, the defense side

17 asserts that despite two prior sustaining of objections

18 there was a third attempt to elicit evidence regarding

19 the hatchet. I'll just let the Court's record -- I

20 don't remember three incidences. I think the state

21 sought twice to introduce evidence that he had an ax or a

22 hatchet, not for the purpose, and we argued to the Court

23 this wasn't for the purpose to show that he had

24 propensity to carrying axes or hatchets. It was for the

25 purpose of identifying the speaker, because the defendant

1 had changed his appearance so radically between the
2 murder and the trial that many of the state's witnesses
3 were unable to identify him.

4 THE COURT: We can put different spins on it
5 even innocuously not intending to mislead. I may see
6 something and you may see the same thing, but we don't
7 relate it in the same manner, we don't tell the same
8 story.

9 It would be helpful to me again to have that
10 testimony regarding the ax-like tools. That would be
11 helpful to me. What was said, not what do we think is
12 probably said. But I want to know what the jurors said.
13 Can you do me that favor too?

14 MR. HAYNES: Well, Judge, maybe the defense
15 would be the one to ask on this one. Because I disagree
16 with their assertion that this was introduced three
17 separate times. Maybe the defense knows who testified in
18 those matters since they are the ones making the
19 allegation.

20 THE COURT: I am asking the state.

21 MR. HAYNES: Judge, I'd have to order a trial
22 transcript then.

23 THE COURT: Portion.

24 MR. HAYNES: I don't know what portion the
25 defense believes this was -- I'd be happy to follow the

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1 Court's order. I just don't know where it's at.

2 MR. ADAMS: I think it was Officer Kelly, the
3 female bartender. I don't remember her name.

4 MR. HAYNES: Smeltzer. Wylene Smeltzer.

5 MR. ADAMS: Yeah, Wylene Smeltzer.

6 THE COURT: I'm sorry, I can't hear you.

7 MR. ADAMS: Sorry, your Honor. I believe the

8 three witnesses were Officer Kelly, with the Coeur

9 d'Alene Police Department; and Wylene Smeltzer, the

10 bartender at the Watering Hole; and Brad Bakie, who had

11 been a resident at Harmony House.

12 MR. HAYNES: We can do it now, your Honor.

13 THE COURT: Thank you. That would be helpful to
14 me. My notes are not verbatim, you understand that, or I
15 wouldn't ask for this. All right. Thank you.

16 MR. HAYNES: Your Honor, the next issue that I
17 wanted to refer to was the issue about the tape that you
18 have heard some testimony about. And I think the Court
19 came right down to it in terms of whether the tape was
20 provided to the defense or not. There's two statements I
21 want to make about that, or two points. One is there is
22 no evidence by the moving party that the tape was not
23 produced. There were statements by the lawyers in court
24 that we never got this tape. We have now put on evidence
25 that shows they did get that tape. So, that's the

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1 evidence before the Court, under sworn testimony that
2 they got the tape.

3 The second thing is, your Honor, even if they
4 didn't get the tape, which we believe the evidence shows
5 they did, that error, if it existed, was cured when the
6 original full transcript was finally disclosed to the
7 state when Captain Bergh discovered it in trial. We
8 disclosed it to the defense. We disclosed it to the

9 Court. And then by stipulation we met with the defense
10 and said any statement that you want from the undisclosed
11 portion of the transcript, let us know and we'll see if
12 there can be a stipulation to introduce it into court.

13 Defense counsel had one statement from Ms. Bobo

14 that they wanted introduced to Court. We agreed. I

15 think it was a statement about what time plates were

16 picked up at the Denny's restaurant. And that statement

17 was simply read into the record.

18 So, if there was any error, which we assert

19 there was not, that error was cured by letting the

20 defense have a chance to introduce whatever evidence they

21 wanted out of that side 1 of the transcript. So, there

22 is absolutely no prejudice to them, even assuming they

23 didn't get a tape. But the evidence is that they did.

24 The next issue, your Honor, that was alleged by

25 the defense is that somehow the state threatened George

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1 Lane through his attorney and therefore that was a
2 cumulative error. That's at the bottom of page 2, the
3 very last paragraph that begins "further misconduct."

4 THE COURT: Excuse me, is that item 3?

5 MR. HAYNES: I think item 3, your Honor.

6 THE COURT: And you say Lane? I thought it was
7 Lang (sic).

8 MR. HAYNES: It's Lane. It is a mistyping by
9 the defense. His name is Lane. L-A-N-E.

10 THE COURT: I'll change it in my notes here.
11 Lane, all right, thank you.

12 MR. HAYNES: The Court handled this issue
13 perfectly when George Lane's attorney testified, Suzanna
14 Graham. The evidence was that in my conversation with Ms.

15 ~~Graham that the defendant was not asserting a privilege~~
16 ~~to the Court, a Fifth Amendment privilege, that the~~
17 ~~defendant was simply saying to the Court -- or not~~
18 ~~defendant. Mr. Lane was saying to the Court I don't want~~
19 ~~to testify. I don't want to.~~

20 And I advised Ms. Graham of that, and she
21 testified to that. Not that the state would punish
22 Mr. Lane but that potentially he could be held in
23 contempt of court.

24 Since he was serving a 180 day retained
25 jurisdiction on a felony of his own, a contempt of court

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1 citation could conceivably have detrimental effects on
2 the jurisdiction review committee's report that to
3 whether he was a candidate for probation. Those were
4 facts that his attorney knew, that I knew, that she had
5 an absolute duty to present to him as facts that exist.

6 The fact that she chose to represent to him that
7 she felt we were threatening him in some way was her
8 business and not any kind of state conduct at all. Those
9 were the facts and he needed to be presented with that.
10 And, so, that whole issue would have been way more
11 prejudicial, unduly prejudicial, to the jury's
12 determination, unduly confusing than they would have had
13 any probative value at all. That is not misconduct by
14 the state.

15 The fourth issue, your Honor --

16 THE COURT: Agrifoglio's testimony?

17 MR. HAYNES: Yes, your Honor, that is the fourth
18 issue. Agrifoglio was an unavailable witness through his
19 invocation of a Fifth Amendment right. The Court properly
20 addressed that issue, and the rules of evidence allow his
21 prior and sworn cross-examined testimony to be presented
22 to the jury. The defense has, throughout the trial and in
23 their memorandum, conclusively or conclusorily asserted
24 that we have received substantially more discovery
25 regarding Agrifoglio at the preliminary hearing. I think

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1 they showed the Court a stack of papers, but they have
2 never introduced to the Court what that discovery is.
3 They have never indicated how they would have
4 cross-examined Agrifoglio differently at the preliminary
5 hearing had they had that at that time. The fact of the
6 matter was that discovery was produced to the defense
7 pursuant to their own Subpoena Duces Tecum to the Latah
8 County Jail to produce records, blueprints, whatever.
9 Latah County Jail chose to respond to that Subpoena Duces
10 Tecum by sending to the prosecutor's office what was
11 requested by the defense. We transmitted that to the
12 defense attorney significantly after Mr. Agrifoglio's
13 preliminary hearing testimony.

14 So, the bare assertion that we have substantial
15 discovery after the testimony, there is no indication how
16 that would have changed the cross-examination of
17 Agrifoglio at the time of his preliminary hearing
18 testimony.

19 The defense also asserts that Mr. Agrifoglio
20 well, well after his preliminary hearing testimony, made
21 some telephone calls to the defense office saying that
22 the prosecutor had threatened and offered benefit from
23 the testimony. Again, that's an assertion that comes
24 from the defense side in their writing. There is no
25 evidence regarding that. They merely assert that. That

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1 is not true, as a matter of fact. But even if it was
2 true that there had been some threat or some inducement
3 for testimony, even if it was true, which again I say it
4 was not, that would have come well after his preliminary
5 hearing testimony.

6 It would have been inadmissible to the jury
7 anyway. Because what he testified to in the preliminary
8 hearing he clearly stated I am not being threatened. I
9 have been offered nothing. I am getting nothing for this
10 testimony. So the jury could only determine what bias he
11 may have had at the time he gave the sworn statement. Any
12 bias that may have existed after that is a moot issue,
13 because he never testified at the trial. So there is no
14 misconduct or there is no error there.

15 ~~The very last issue or, actually, the fifth~~
16 ~~issue, I believe, is the Ken Thrift impeachment issue.~~

17 I'll touch on that very briefly, because the Court dealt
18 with it on the record. The Court of Appeals has an
19 absolutely good record on that. Any convictions for
20 which impeachment by prior felony conviction was
21 available were all outside of ten years. The Court
22 properly ruled that those are --

23 THE COURT: It was not merely just beyond ten
24 years. There were a number of the charges, the
25 convictions, that had, in my opinion, nothing to do with

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1 veracity.

2 MR. HAYNES: Exactly, exactly, your Honor.

3 So the last issue I would address on No. 6 was
4 the prosecutor's closing argument that somehow the
5 defense believes that the prosecutor argued that the
6 defendant should be convicted because of his appearance
7 at the time of the booking photo. The prosecution's
8 closing argument was clearly that he had changed his
9 appearance, that's a fact. That's in evidence. That he
10 had changed his appearance. An inference can be drawn to
11 change his identity so that people could not identify him
12 as the speaker of prior threats and simply ask the
13 rhetorical question who is the man that did the killing,
14 the good looking person in court or the person that
15 looked like this at the time? And I held up a picture
16 and said this is the man that did the killing. This is
17 who he is, this is who did it.

18 THE COURT: Correct me if I'm wrong, but didn't
19 the defendant call a number of witnesses, some of whom
20 didn't recognize him?

21 MR. HAYNES: I don't know if the defense called
22 any witnesses. But the state called several witnesses,
23 several whom could not identify the defendant any more.
24 So, we were clearly allowed to argue his change of
25 appearance for the inferred purpose of concealing his

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1 identity from witnesses who had heard him make
2 pre-killing threats against Mr. Smith. And we were
3 clearly allowed to argue to the jury about holding up the
4 picture this man as the one who did it. The evidence
5 proves he did it, not based on how he looks, but based on
6 the fact that he's the one that did it. With that I'll
7 provide the Court with transcripts that you have
8 requested, and I have no further argument.

9 THE COURT: Thank you. Mr. Gresback and Mr.
10 Adams.

11 MR. ADAMS: Thank you, your Honor. I'll try to
12 cover some rebuttal here. I don't recall ever telling
13 the jury that Gerry Barcella was a convicted felon. I
14 think what we told the jury was, to explain why he had
15 been in jail for so long, was that he had been arrested
16 and convicted of having firearms that he wasn't supposed
17 to have. I don't think I ever used the phrase felon in
18 possession. I don't think I ever used the phrase
19 convicted felon, for one thing. And even if I did, that
20 is such a red herring. That has nothing to do with even
21 if we have did say the reason we have this booking photo
22 -- and I remember the Court commenting to the jury
23 that's a minor thing, that booking photo. You are not to
24 consider anything of it. Even if we did say he had a
25 prior felony conviction, how on earth does that open the

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1 door for the state in its case in chief to elicit on
2 direct, not even redirect, on direct examination that he
3 twice before shot people and got away with it. What on
4 earth was that relevant to in any scheme in this case?
5 Absolutely nothing. The only issue in this case was did
6 Gerry Barcella kill a man or did somebody else do it.
7 That was the only issue.

8 Now, the only relevance to eliciting from an
9 inmate witness that Barcella, while in custody, had
10 admitted doing two prior shootings was to show that he
11 acted in conformity with his prior conduct. That doesn't
12 show guilty knowledge. It doesn't show identity of the
13 perpetrator. It-- or --

14 THE COURT: You've got to tie that alleged --
15 those alleged statements about prior shootings with the
16 fact that he said in addition to that, he, Mr. Barcella,
17 that they couldn't convict me of this charge. I mean,
18 it's all tied together. It's almost prefatory, is the
19 problem.

20 MR. ADAMS: Yeah, that's the problem, that it
21 was tied together, exactly. That's where the prejudice
22 is. The jury was told the reason he thinks he is going
23 to get away with this one is because he got away with it
24 twice before. That's the whole problem. You tell a jury
25 that sits and judges him whether this man committed a

1 inform his witnesses what they are and are not allowed to
2 say in front of a jury. And that, I think, should have
3 stuck up a big red flag in front of Mr. Haynes, who has
4 been doing these type of trials for a long, long time.
5 He is the leading prosecutor in this county on this type
6 of work. And for him to say, well, geez, it was a
7 surprise to me, just doesn't jibe with the facts.

8 And he says that the relevance of that -- I
9 mean, let's go to that. Why did he ask the witness that
10 in the first place? Does Gerry tell you why he thinks he
11 is going to get away with this crime? What's the
12 relevance of that question? What possible legally
13 admissible response can he get? He knows what the
14 response is. It's not like the witness all of a sudden
15 is going to come up with a surprise response. Well,
16 because Gerry killed the only witness to the murder, or
17 Gerry buried the murder weapon behind his garage. What
18 is the possible answer that this witness is going to give
19 to that question? There is only one probable answer. He
20 got away with it twice before.

21 So, for the prosecutor to tell you he expected
22 something else to come out of that, is belied by the
23 transcript. What possible relevant response could he
24 have expected from that witness? None, no relevant
25 response. Because the response previously, on both

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1 murder that he claims to have gotten away with it twice
2 before and he's going to do it again unless you convict
3 him, that's a pretty clear --

4 THE COURT: Suppose the witness had not
5 testified to Barcella saying I got away with two prior
6 shootings. Suppose he hadn't said that. Suppose
7 Mr. Barcella hadn't said that. The only evidence
8 regarding what he said was Mr. Barcella's statement,
9 well, they can't place me there, so they can't find me
10 guilty. Now, is that inadmissible, that later part?

11 MR. ADAMS: No, that's probably admissible.

12 THE COURT: So, it's part of an overall
13 statement, part of which is clearly admissible.

14 MR. ADAMS: I don't know if clearly.

15 THE COURT: Well, said yes that yes --

16 MR. ADAMS: I suppose it is admissible for the
17 witness to claim that Mr. Barcella said they can't
18 convict me because nobody saw me commit this crime. I
19 suppose that is an admissible statement. It sounds like
20 an exculpatory one to me, but sure, that is admissible.
21 But to say anything that the witness says in the same
22 breath is therefore also admissible, I think really is --

23 THE COURT: I understand your position.

24 MR. ADAMS: You know, and the state says that
25 the defense somehow could have avoided them eliciting in

1 occasions the witness was asked, was the same. He had
2 gotten away with it twice before. He expected to get
3 away with it a third time.

4 Judge, I'm just going down the order in which
5 this argument took place and addressing them. You spoke
6 about Rupp not being apropos to this because of character
7 evidence. And the reason we cited that is because -- and
8 your ruling on a motion for mistrial you said it could
9 come in as character rebuttal since I had opened the door
10 on opening, telling the jury.

11 THE COURT: That's what I would like to right
12 result, wrong means.

13 MR. ADAMS: I think that is an appellate
14 standard and probably not a trial court standard, in all
15 respect to you, your Honor. There is an appellate
16 standard that if they can sustain the result of the
17 trial, even though the Judge made a wrong ruling --

18 THE COURT: Mr. Haynes, you know very well --
19 Mr. Haynes, excuse me. Mr. Adams you know very well, as
20 I know, I have read a lot of opinions of appellate courts
21 saying the trial judge committed error but he -- we got
22 the right result. He got the right result, for whatever.

23 MR. ADAMS: My personal opinion is that the
24 harmless error doctrine is the biggest buffoon in this
25 whole country.

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1 their case in chief on direct evidence these alleged two
2 prior bad acts by pointing it out to a judge beforehand,
3 we believe the state is going to do an unethical and
4 illegal thing in this trial. Judge, we'd like you to
5 order them not to do it, I think is a little presumptuous
6 of me. I have a little bit more respect for Mr. Haynes
7 than that. That's why I filed a general 609 and 404
8 motion and put it to the trial judge. I believe that
9 there may be bad acts, and I ask you to order to this
10 prosecutor before he decides to bring any in front of
11 this jury to bring it up outside of the presence so we
12 can have a judicial review of that.

13 THE COURT: But Mr. Haynes says he wasn't
14 anticipating that.

15 MR. ADAMS: That's a real problem for
16 Mr. Haynes, being a long time professional prosecutor.
17 When he has a transcript sitting in front of him where
18 the witness twice, in response to the same question, said
19 because he had done two prior shootings, for him not to
20 anticipate that the witness is going to say it the third
21 time I think is disingenuous, your Honor. When the
22 witness has said it twice before and all of a sudden
23 magically the fairy dust, is he going to change his story
24 in front of the jury? I don't think so.

25 He has an obligation, he has an obligation to

1 THE COURT: Perhaps you can convince the Supreme
2 Court of that.

3 MR. ADAMS: I'm sure trying, Judge. I'm sure
4 trying. I know a lot of families with daddies in prison
5 because of that doctrine and my feeling about that.
6 That's not the point of this argument.

7 And I just wanted to point out to the Court that
8 the reason we cited you Rupp was that because of
9 the ruling during the trial was that this was character
10 evidence. And the holding in Rupp is you can't rebut,
11 even on open door, on character with specific incidences
12 of conduct like two prior shootings. That's the reason
13 we cited that, and that's the only reason, your Honor.

14 Next in the argument was the discussion on the
15 Bobo tapes, Judge. And we just cite that as one of the
16 cumulative errors that occurred during this trial. In
17 and of itself probably not the strongest grounds for
18 mistrial that I'm ever going to hang my hat on. And I'm
19 not expecting anybody is going to get too excited about
20 that and reverse an otherwise fairly arrived at verdict
21 simply based on that error. However, in the cumulative
22 errors that occurred, that was one that had occurred in
23 the accumulation of errors prior to Lane's testimony
24 about the prior bad acts. And that's why we bring it up
25 in this motion, as one of the cumulative things that led

1 up to at the point we made the motion what we felt had
2 been an unfair trial. It culminated in Lane's
3 testimony.

4 And, you know, then we move into the threats
5 alleged by Lane's attorney which she perceived as threats
6 and Mr. Haynes tells you one, Judge, it's not true, I
7 never did that. Well, you know, Gerry Barcella is
8 claiming that he never admitted to any of these people he
9 did the murder either. Now it's real easy for a witness
10 to claim he made a statement and then for an ostensible
11 declarant to deny making it. That's neither here or
12 there. We know what they would disclaim. You assume
13 Lane's statement attributing confessions to Barcella are
14 true, just as I think I am entitled to assume what a
15 witness --

16 THE COURT: But what I assume and what you
17 assume isn't important. It's what the jury decides. I
18 don't recall how many witnesses, but several witnesses
19 testified that Mr. Barcella had told them that he
20 committed the crime.

21 MR. ADAMS: Right, but --

22 THE COURT: Are all of those witnesses
23 committing perjury? That was, I am sure, very important
24 to the jury, that this many people, including a bar
25 maid -- wasn't there a bar maid?

1 MR. ADAMS: Yeah, who a year and a half after
2 the ostensible statements were made regarding the death
3 of her best friend, made these statements only after the
4 police sought her out. I mean, boy, I don't think even
5 that jury, unfortunate as they were, believed that story.

6 But what I'm trying to point out here is Mr.
7 Haynes thinks that it's important that he tell you that
8 he never made the threats that the witness claimed were
9 made. And what I am saying is that that is as hollow as
10 the defendant saying I never made the confession that
11 they said I made. That's not the point. The point is
12 that the witness is willing to get under oath and say the
13 statements were made. And this prohibited me from
14 bringing that out in front of the jury. That's the
15 problem. It's not whether Mr. Haynes agrees that he said
16 that. It's whether the jury can hear the witness make
17 those claims. That's the point.

18 THE COURT: I'm lost on that. I'm sorry.

19 MR. ADAMS: I'll move on.

20 THE COURT: Give me that again. Run that by me
21 again.

22 MR. ADAMS: Mr. Haynes said we should not have
23 been able to impeach Lane's motive and bias in testifying
24 by presenting the jury with evidence that he was
25 testifying under duress and under threats from the state

1 and that we shouldn't have been able to impeach him
2 because Landy denies threatening the witness, even though
3 we had his attorney, who was willing to testify under
4 oath to the jury, that the threats were made. He says we
5 shouldn't be allowed to do that --

6 THE COURT: I don't recall that witness, the
7 attorney.

8 MR. ADAMS: That was the female attorney, Judge.

9 THE COURT: Pardon me?

10 MR. ADAMS: That was the female attorney, Judge.

11 THE COURT: Yes. I don't recall her saying
12 anything about, well, this is what's going to happen if
13 he doesn't do it. I am going to -- the prosecutor's
14 office is going to do this or that. I don't recall
15 testimony to that effect. She was aware -- she herself
16 testified that she was aware of the consequences that
17 could flow and they didn't come from Mr. Haynes' office.
18 It came from her own background, her own knowledge.

19 MR. ADAMS: With due respect to the Court, I
20 have a different recollection.

21 THE COURT: Well, then maybe I'll get a copy of
22 that one too.

23 MR. ADAMS: Certainly. Sometimes, to be honest
24 with you, I hear things a lot differently than the
25 persons who are supposed to be objective hearing

1 evidence.

2 THE COURT: We all do. We instruct jurors to
3 that effect, don't we?

4 MR. ADAMS: Yes, sir. And in that regard, my
5 ethical obligation again is different than the
6 prosecutor's ethical obligation who is rather more
7 objective, ostensibly, than the defense attorney is.

8 But, the point I was trying to make is just
9 because the declarant claims that he didn't make the
10 statements that the witness is going to say he made is no
11 grounds to keep that witness from testifying. That's why
12 we have juries. If it was so easy to keep a witness off
13 the stand simply by saying, oh, the witness can't testify
14 because I deny I ever said that, no defendant would ever
15 go to trial on a confession, because all he'd have to do
16 is say I never said it and then the Court would say well,
17 the witness can't testify because the defendant denies
18 saying it. That's all I was trying to point out.

19 As far as the last two, Judge, well, three,
20 Agrifoglio, Thrift, and the photo. Agrifoglio, I think
21 we've made it pretty clear our feeling on that was more
22 cumulative error that deprived him of a fair trial
23 culminating in Lane's statement about prior bad acts. You
24 know, there was impeachment evidence on Agrifoglio going
25 to his motive for testifying, his bias in testifying, and

1 whether in fact he had previously testified falsely. You
2 prohibited us from placing that in front of the jury
3 following the reading of his preliminary hearing
4 testimony. And I believe that was error.

5 Judge, on Kenneth Thrift, we have cited you
6 cases that talk about even though an individual crime
7 each crime in and of itself may not be directly related
8 to veracity. When a person, a witness, has conducted
9 their lives in pattern, a general pattern of showing
10 disrespect for the law, then that pattern should be
11 allowed.

12 THE COURT: Counsel, if the rules so provided
13 it, then I would have gone along with you. But the rule
14 didn't so provide. The rule doesn't so provide.

15 MR. ADAMS: I believe case law interpreting the
16 rule provides that in addition to crimes like burglary or
17 theft which relate directly to veracity there is also a
18 type of veracity impeachment when you can show that the
19 pattern of a person's life, the pattern of conduct shows
20 a general disrespect for the law, true.

21 THE COURT: Excuse me just a second here.

22 MR. ADAMS: Included in those cases are State
23 versus Gene Allen, State versus Pierce, cites therein.

24 THE COURT: Yeah, okay, State versus Pierce is
25 cited.

1 MR. ADAMS: And I think the first time that
2 document at least in modern jurisprudence which we refer
3 to in the state was in the Court of Appeals decision
4 State versus Gene Allen, where they talk about dividing
5 up into three categories and also recognizing the general
6 pattern.

7 THE COURT: Will you give me that cite? It's not
8 in the brief.

9 MR. ADAMS: No, I think the cite --

10 THE COURT: If you know any cite. You provided
11 me State versus Pierce.

12 MR. ADAMS: I can give you Gene Allen's case.
13 I'll provide that for you.

14 THE COURT: Okay. If you would later, that's
15 fine.

16 MR. ADAMS: But generally, you know, this ten
17 year thing is discretionary with the Court. If you find
18 that regardless of whether these crimes are within or
19 without that ten year rule, if they do exhibit a general
20 pattern of disrespect for the law, such as would tend to
21 portray the witness as one not inclined to be a very honest
22 man, then it is within your discretion. I believe that
23 was an error of law which should mandate a new trial in
24 this case. Not allowing the jury to hear the full story
25 about of these witnesses, the a man with some 94 prior

1 sentencing. If they are going to ask for death, they
2 ought to tell us, and they ought to tell us now.

3 THE COURT: Gentlemen, let me suggest that you
4 familiarize yourself with State versus Brian Lankford.
5 That's a case that I'm now the third -- it was a murder
6 committed in '83. I think the sentence was imposed in
7 '84. That was overturned by the U.S. Supreme Court.
8 Then it went to -- Supreme Court of Idaho took it away
9 from Judge Reinhardt and had Judge Schilling go eight
10 days. And now it's in my bailiwick, so I am familiar
11 with that particular problem. What is your position with
12 respect to the penalty?

13 MR. HAYNES: Your, Honor our understanding is
14 that this Court ordered a presentence investigation
15 report to be done by March the 2nd of '98. The state's
16 position would be for us to receive that presentence
17 investigation report and then draft for you at a schedule
18 that you may set whether we are going to seek the death
19 penalty and upon what aggravating factors we are going to
20 rely.

21 THE COURT: I think that is appropriate.
22 Because what happened in Lankford, as you know, Judge
23 Reinhardt surprised everybody with the death penalty, and
24 it's been a mess. And I'm struggling with it now. And I
25 can impose the death penalty, based on the most recent

1 feed them for their testimony. So that's what I'm asking
2 the Court for.

3 THE COURT: My golly.

4 MR. HAYNES: I don't know how to respond to
5 that, your Honor, whether that's a position we should be
6 involved in or not.

7 THE COURT: Let me know within the next ten days
8 whether or not you have reached an agreement. If you have
9 not, then I'll take it upon myself to exercise sound
10 judicial discretion, but this is important.

11 MR. ADAMS: That's all we have. Thank you very
12 much, Judge.

13 THE COURT: All right. Fine. Thank you.

14 MR. HAYNES: Thank you, your Honor.

15 THE COURT: Court is now in recess in the matter
16 of State versus Barcella. As I have mentioned before, I
17 am not ruling from the bench. In due time, reasonable
18 period of time, I will have my decision. Thank you.
19 (Hearing concluded at 3:24 p.m.)
20
21
22
23
24
25

1 Brian Lankford case, double jeopardy and sentencing, I
2 think they made reference to.

3 MR. ADAMS: I believe so, Judge. Tim and I
4 have worked on his brother Mark's case.

5 THE COURT: Oh, that's right.

6 MR. HAYNES: Even to get some definiteness, if
7 that's a word, definitely to it, I guess, could we have two
8 weeks from March 2nd PSI date to get that to the Court?
9 March the 16th.

10 THE COURT: That's fine with me. I think
11 everybody's interests are best served by giving everybody
12 a lot of time to think about that.

13 MR. HAYNES: Thank you, Judge.

14 THE COURT: And I would request that the clerk
15 mail to the clerk in Moscow a copy of the presentence
16 investigation report so I can go to Terry, our chief
17 deputy clerk there, and say hey, I need it, and that will
18 be it.

19 Gentlemen, anything further to come before me?

20 MR. ADAMS: Lastly --

21 THE COURT: One more, Mr. Haynes? Or Mr. Haynes.
22 I've done this for three weeks, haven't I? Mr. Adams.

23 MR. ADAMS: The last thing from us, your Honor,
24 is to ask you, I don't know whether the state wants to
25 take a position in this, is for funds to bring the

1 witnesses to testify at the sentencing hearing in
2 mitigation for Mr. Barcella. I don't know if the state
3 wants to be part of that. If not, then I would address
4 you ex parte on that. But, obviously, as you know from
5 the trial, most of his family and friends, most of our
6 mitigation witnesses are East Coast, and we are going to
7 need some money to get them over here.

8 MR. HAYNES: Uhm --

9 THE COURT: Why don't you think about it,
10 gentlemen. Talk it over and then let me know. Most of
11 the witnesses -- family members testified as to his --
12 the defendant's good character.

13 MR. ADAMS: They were pretty limited --

14 THE COURT: Yeah, they were, because of the time
15 element. Well, I think you are entitled to bring forward
16 a reasonable number of witnesses to help me make my
17 decision as to the penalty to be imposed.

18 MR. ADAMS: Judge, we have boiled it down, and I
19 have submitted 58 different witnesses and their opinions
20 to your presentence investigator. I am asking for funds
21 to bring between eight and ten live witnesses to
22 supplement that. So we are trying to be reasonable and
23 not bring 60 people out here. And I predicted or have
24 looked at it, and it's about \$10,000 I'll be requesting
25 to fly those witnesses from the East Coast and house and

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1 offenses, 94 arrests and some several dozen felony
2 convictions. I think for the jury to really look at the
3 credibility of a witness like that and get a fair picture
4 of who this person is, they should be entitled to know
5 that this is how the person has lived their life with
6 that kind of respect for the law and that kind of respect
7 for the truth.

8 The last one was the photo, your Honor. It was
9 never disputed in this case that there was a lack of
10 identity. This was never told to this jury. The defense
11 never raised identity as an issue here. Nobody ever
12 claimed that the person who lived at the Harmony House,
13 the person who was doing things that these witnesses
14 talked about was some other person than the man sitting
15 in front of them at the trial.

16 I think it was even pointed out when Ken Thrift
17 was looking around and couldn't find Gerry, and I said
18 Ken, this is Gerry right here. He has lost weight.
19 Look, here's Gerry. There was no defense effort,
20 absolutely none, not even a hint that the defense was
21 trying to say that this person these witnesses are
22 talking about is a different Barcella than the Barcella
23 sitting in front of you there. That was never raised.

24 For the state to hold up a picture of a man and
25 say look at this, this is the kind of guy that would do

1 THE CLERK: A.
2 THE COURT: We've already got an A, don't we?
3 THE CLERK: That was the other hearing. We have
4 an A from the trial.

5 THE COURT: Put "motion," not "trial,"
6 "motion."

7 All right. Defendant's Motion Exhibit A is
8 admitted into evidence.

9 (Defendant's Motion Exhibit No. A admitted)
10 THE COURT: Help me, gentlemen. We are talking

11 about 21 tapes. Is that the entire transcript of those
12 interviews? It took 21 tapes, is that it?

13 MR. HAYNES: No, your Honor. I think Captain
14 Bergh's testimony was that a total of 21 tapes were
15 delivered to Steinley's for copying for the public
16 defender, one of which was the Bobo April 11th tape.

17 THE COURT: So, they were all of the interviews
18 conducted by the police were on those tapes?

19 MR. HAYNES: Yes.

20 THE COURT: And there were 21 of them?

21 MR. HAYNES: Yes, one of which was the Bobo
22 tape.

23 THE COURT: Yes. So, what we have here then is
24 a receipt by Mr. Durant that he received 21 tapes. And
25 included on one of those tapes was the Bobo interview; am

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1 this, I don't know. I've made my argument on that. I
2 better not continue speaking about my feelings on that
3 effort. Thank you, Judge.

4 MR. GRESBACK: The Court's indulgence.
5 Judge, I was wondering, in addition to the
6 portions of transcript already requested, it seems that
7 it may help the Court under the pending motion to
8 determine the pending motion, for example, whether
9 Mr. Adams's opening statement, that would be a good one
10 to have, I believe, because there, whether he opened the
11 door and exactly what he said, whether it was prior
12 felonies or you are going hear about his past, no one can
13 seem to remember exactly. Also, the testimony of Suzanna
14 Graham, Mr. Lane's lawyer. The testimony of Robert
15 Agrifoglio and Rikki Bobo.

16 THE COURT: But what I will do, Counsel, I don't
17 know that I need this many transcripts, but if I can get
18 copies of the tapes, I can put them in -- they are were
19 different speed, but I'll put them in the tape down in
20 Moscow. So I'll let the clerk know what tapes I want.
21 That's a good idea. I'm going to have a copy made of
22 today's argument, because this is important to me, as
23 well as to your client.

24 Anything further, gentlemen?

25 MR. ADAMS: No, thank you, your Honor.

1 I correct?

2 MR. HAYNES: That's our position.

3 THE COURT: Well, do I have to listen to all 21
4 of them to find out whether they were on the Bobo tape or
5 the Bobo tape was on them?

6 MR. HAYNES: Judge, I don't think so, because
7 the defense has simply asserted that they never got the
8 Bobo tape. And our position is that we gave them 21
9 tapes, which included the Bobo tape. They signed for 21
10 tapes. We gave them the Bobo tape. Now, whatever
11 happened to it after they got it is up to them. But we
12 met our burden by giving them the Bobo tape. And I think
13 that proves that.

14 MR. ADAMS: I'll tell you what I'll do, Judge,
15 for the purpose of right now, I'm not going to ask the
16 Court to listen to 21 tapes. I think it is safe to
17 assume that if Captain Bergh said that that Bobo tape was
18 in that 21, you can assume that. I will go back and
19 listen to them, and if it is wrong, I will come and tell
20 you. I'll listen to them.

21 THE COURT: Yeah. Let Mr. Haynes know, and you
22 gentlemen can get in touch with me, make a record some
23 way or another.

24 MR. ADAMS: And I think this is fair. This will
25 be in the record that the receipt speaks about more than

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1 MR. HAYNES: Not by the state, your Honor.

2 THE COURT: All right. We are still up in the
3 air about the receipt.

4 MR. ADAMS: I have it here, Judge. I'll show it
5 to the state and I'll give it to the Court. I'd offer it
6 as an exhibit, and you can make your mind up on it. I'll
7 need to copy it, because this is the only one I have.
8 (Defendant's Motion Exhibit A offered).

9 MR. ADAMS: Judge, if I can look at your Rules
10 of Evidence.

11 (Discussion off the record)

12 MR. HAYNES: Your Honor, I have no objection to
13 this being Court's exhibit, as long as counsel agrees
14 that the signature at the bottom of this receipt is Mark
15 Durant, the office investigator for the public defender,
16 and that the receipt indicates the turning over of 21
17 tapes.

18 MR. ADAMS: I think the receipt speaks for
19 itself. I will stipulate that my investigator signed this
20 receipt. I think the Court is able to read it as
21 Mr. Haynes.

22 THE COURT: Well, let me look at it. You want
23 it marked now? Mr. Haynes, you have no objection?

24 MR. HAYNES: No objection.

25 THE COURT: All right. This will be marked --

1 21 tapes. And it is a little ambiguous. And that's why
2 it is being submitted to you.

3 If I could, that cite for State versus Gene
4 Allen is at 113 Idaho 676. It's at 747 P.2d 85. It's a
5 1987 Court of Appeals case.

6 THE COURT: Thank you.

7 MR. ADAMS: Here it is.

8 THE COURT: Is there anything further to come
9 before the Court at this time?

10 MR. HAYNES: No, your Honor.

11 MR. ADAMS: There is, your Honor, one further
12 thing. Prior to trial, we filed a motion requesting the
13 court order the prosecutor to elect whether he was going
14 to seek death as a penalty and if so, to state upon which
15 aggravators they would rely. I believe Judge Haman, upon
16 hearing that motion, stated that if and when Mr. Barcella
17 was convicted the state should do that.

18 It's been quite a while, Judge, and I haven't
19 received anything. So at this time I would ask you to
20 preclude the state from asking for death. I don't think
21 it is fair of them, when we have had pretrial motions on
22 this, to walk in the day of sentencing and spring
23 aggravators on me. So maybe give them until the end of
24 business day or something. But back up on pretrial motion
25 and order and not let them surprise us the day of



RONALDO A. COULTER
State Appellate Public Defender
State of Idaho

MICHAELINA MURPHY
Chief, Appellate Unit
P. O. Box 83720
Boise, Idaho 83720-0005
(208) 334-2712

STATE OF IDAHO }
COUNTY OF KOOTENAI }
FILED

DEC 16 4 08 PM '98

CLERK DISTRICT COURT
Cindy D. Beatty
DEPUTY

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR KOOTENAI COUNTY

STATE OF IDAHO,
Defendant-Respondent,

vs.

GERALD A. BARCELLA,
Plaintiff-Appellant.

CASE NO. CRF 96-03185

NOTICE OF APPEAL

ORIGINAL

TO: THE ABOVE-NAMED RESPONDENT, STATE OF IDAHO, AND BILL DOUGLAS, PROSECUTING ATTORNEY, KOOTENAI COUNTY, P.O. BOX 8000, COEUR D'ALENE, IDAHO 83816-1973, AND THE CLERK OF THE ABOVE-ENTITLED COURT:

NOTICE IS HEREBY GIVEN THAT:

1. The above-named appellant appeals against the above-named respondent to the Idaho Supreme Court from the FINDINGS OF THE COURT IN CONSIDERING THE DEATH PENALTY UNDER SECTION 19-2515, IDAHO CODE entered in the above-entitled action on the 6th day of November, 1998, The Honorable John H. Bengston, presiding.

2. That the party has a right to appeal to the Idaho Supreme Court, and the judgments or orders described in paragraph 1 above are appealable orders under and pursuant to Rule 11(c)(1), I.A.R.

3. This preliminary statement of the issues on appeal is not all inclusive and the Appellant may bring additional issues. The appellant preliminarily asserts the following issues:

The State persevered in attempting to elicit evidence of "unduly prejudicial bad acts" of the defendant and evidence of defendant's character;

Failure of the State to disclose "a significant amount of prior statements" made by one Rikki Bobo, a witness called by the State in its case in chief;

The Court's refusal to permit defendant to place evidence before the jury that the State had allegedly "threatened" State's witness George Lane through the latter's attorney if Lane refused to testify;

The Court's denial of defendant's motion for mistrial;

The Court's permitting the preliminary hearing testimony of State's witness Agrifoglio to read to the jury because of his refusal to testify at trial;

The Court's refusal to allow defendant to impeach Ken Thrift, a witness for the State;

The prosecutor's closing argument constituted prosecutorial misconduct and was inflammatory and made misstatements of fact and law;

The sentence was excessive;

4. Is a reporter's transcript requested? Yes.

The appellant requests the preparation of the following portions of the reporter's transcript: The appellant requests the preparation of the entire reporter's standard transcript as defined in Rule 25(a), I.A.R. Additionally, the appellant requests all preliminary hearing transcripts, all motion hearing transcripts, the jury instruction transcripts, pretrial conference transcript, voir dire transcripts, opening and closing statement transcripts, sentencing transcripts, and post-trial motion hearing transcripts.

5. The appellant requests the normal clerk's record pursuant to Rule 28, I.A.R.

6. The appellant further requests that the Pre-Sentence Investigation Report, the jury instructions, and all memorandum supporting motions be included in the clerk's record, the jury instructions, and memorandum in support of motions.

7. I certify:

(a) That a copy of this notice of appeal is being served on the reporter.

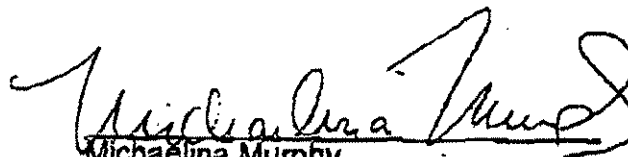
(b) That the appellant is exempt from paying the estimated fee for the preparation of the record because the State of Idaho is the appellant (Idaho Code § 31-3212 (2));

(c) That there is no appellate filing fee since this is an appeal in a criminal case (I.A.R. 23(a)(8));

(d) That arrangements have been made with Kootenai County who will be responsible for paying for the reporter's transcript;

(e) That service is being made upon all parties required to be served pursuant to Rule 20, I.A.R.

DATED this 16th day of December, 1998.


Michaelina Murphy
Deputy Appellate Public Defender
Attorney for the Appellant

CERTIFICATE OF MAILING

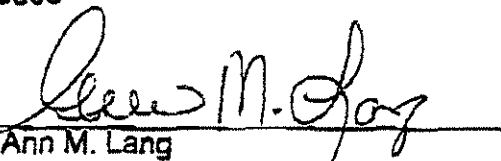
I HEREBY CERTIFY that I have this 16th day of December, 1998, caused a true and correct copy of the attached NOTICE OF APPEAL to be placed in the United States mail, postage prepaid, addressed to:

JOHN M. ADAMS
KOOTENAI COUNTY PUBLIC DEFENDER
P.O. BOX 9000
COEUR D'ALENE, ID 83816-9000

JOANN SCHALLER
COURT REPORTER
KOOTENAI COUNTY
P.O. BOX 9000
COEUR D'ALENE, IDAHO 83816-9000

BILL DOUGLAS
KOOTENAI COUNTY PROSECUTOR
P.O. BOX 9000
COEUR D'ALENE, IDAHO 83816-1873

HONORABLE JOHN H. BENGSTON
DISTRICT JUDGE
P.O. BOX 9000
COEUR D'ALENE, IDAHO 83816-9000


Ann M. Lang

MBM/aml

Miscellaneous Reasons
for
Post-Conviction Relief.

Significant probability of a Contaminated Jury pool

Trial judge, prosecutors nor defense counsel further vordiced the prospective jurors concerning highly inflammatory, prejudicial statements by William Tamasonie stating people get less punishment for murder than for smoking marijuana or snorting cocaine and that society lets murderers go free or with little punishment and that 80% of the jury pool felt that way

Tip 91423 - p 92, 41-17

Improper Jury Instructions

The prosecution told a prospective juror she would not have to look at photographs of victims wounds but could have another juror describe the photos to her had the potential of causing a faulty process Tip. 163 L25 - p 164, L1-8

Manifest Injustice Occurred

Barcella's defense was prejudiced by the cumulative impact of errors by trial counsel during pretrial, trial and sentencing phases and when added to the multitude of perjured testimony, prosecutorial misconduct and judicial errors and manifest injustice resulted.

Access to Courts, Due Process
Effective Assistance of Counsel
Violations

Kootenai Cty Sheriffs deputies routinely harassed, intimidated and threatened Barcella concerning his helping on his case. Kootenai Cty jail kites #1, and #2 (both 06-21-97)
Take judicial notice of underlying criminal file including transcripts

Kootenai Cty Sheriffs deputies interfered with Barcella's open communication with his attorneys by denying or delaying by an hour and one-half legal visits by his attorneys and/or investigators on a constant basis.

Barcella was limited to 2 kites per day by jail officials K.C.J. kite #35 (09-02-97).

These kites were subject to prosecution's peruse so had to have limited content even furthering Barcella's limited contact with his attorneys. K.C.J. kite #15 - (08-11-97)

Take Judicial notice of underlying criminal file including transcripts.

Kootenai Cty Sheriffs deputies planted snitches on Barcella in violation of law and ethics K.C.J. kite #31 (08-30-97)

Access to Courts, due process and
Effective Assistance of Counsel Rights
Violated

Kootenai Cty jail officials routinely
opened and censored Barcellos legal mail
between him and his attorneys while
awaiting trial. This was consistent,
not sporadic.

Take judicial notice of underlying criminal
file including transcripts

Kootenai Cty Sheriffs Dept staff obtained
Court ordered sealed results of MRI & EEG
tests done on Barcello in violation of state
and federal law. See Judge Hamons order
pretrial motions p. 9, 23-25 and

Kootenai Cty jail kites #37 (08-03-95),

Deputies went to medical center that
administered the tests and demanded results.
Jail staff had told medical center staff
that they be notified when results were
done.

Take judicial notice of underlying criminal
file including transcripts

Due Process / Access to Courts Denied

When M- Barcella's investigator Mark Durant went to one of Rikki Bobo's storage areas to obtain approximately \$10,000.00 worth of tools and Barcella's other property from Barcella's room at 205 Indiana for evidence someone (police) tipped Bobo off the night before and the unit was conveniently burglarized. The night before leaving only 2 photographs of Barcella, Bobo and 2 dogs.

New Evidence

Mr Barcella was denied the right to present several pieces of evidence to the jury by his counsel's refusal to openly communicate with Barcella and by telling Barcella anything he told counsel was subject to disclosure to the prosecution if it could be construed as guilt or knowledge of the crime.

Mr Barcella claims he was denied a fair trial and would like to present such evidence.

See ineffective assistance of counsel

Sentence was decided on through wrongful assumptions of defendant's criminal record and prior bad Acts That were materially untrue

On p. 4 of PSI - Charges listed in paragraphs #2, #3, #4 are from one case which resulted in a misdemeanor conviction for Reckless endangerment on 08-03-77
aprox 20 days time served, 1 year suspended, 1 year probation

Paragraph #6 lists a DUI accident Mr Barcellas denies this. There are no charges ever recorded, nor record of any accident.

On p. 5 PSI - paragraph 4 lists breach of peace and assault w/ no outcome. Mr Barcella does not know anything about this and the charges are not in CT records or Federal records.

This could be the same case listed in paragraph 5

Paragraph 6 PSI. lists disposition: 3 years prison 4 years suspended, jail 1 year, probation 2 years. 115
The disposition in fact was: jail 1 year

2 years suspended, 2 years probation

Page 6 PSI, paragraph ^{# # #} 1, 2, 3, are all the same case.

Disposition: 5 years suspended, 1 year jail, 5 years probation, substance abuse and alcohol abuse counseling

Page 6 PSI paragraphs ^{# #} 5, 6 Same Case
all charges dismissed except drug paraphernalia, misdemeanor approx 95 days time served.

Page 7 PSI para. [#] 2, [#] 3 same case

Page 7 PSI para [#] 5, Barcella was not involved in any altercation. Barcella responded to a phone call from his brother "Bill" that he was going be jumped by 3 large patrons at a local bar. When Mr Barcella arrived the disagreement was over and Barcella immediately left after approx 1-2 minutes

Page 7, PSI para [#] 6 Mr Barcella does not think he was/acted appropriately by listing an alleged action in which Barcella was not involved. C.I.C. defense is not illegal! 116

Page #8 PSI para #1 malicious injury to property was dismissed after Barcella paid for a broken window

Page #8 para #2 Mr Barcella does not remember this and will not acknowledge it!
Counsel improper gave this to probation office

Page #8 para. 3 No charges were filed for a reason! This was improperly given to probation office by Barcellas attorneys.

Page #8 para. 5 and 6 same case

Page #9 para #1 disposition was community service rendered in Wallace, Idaho (D.W.I)

Page #9 paragraph #5 and page #10 para #1 is preposterous as Larry Skinner only knew Barcella till he was aprox 18 years old then Skinner left the local police department. Mr Barcella's family has had a vendetta with Skinner since the early 1970's. Skinner's bogus charges in 1977 didn't stick.

The Prosecutor's Conduct Was So Bad
As to Deprive Gerald Barcella of A
Fair Trial AND Find Him Guilty of
Murder In The First Degree In Violation
of The U.S. Constitution.

The prosecutors conduct in obtaining
evidence and during trial was so bad as
to deprive Gerald Barcella of his 5th, 6th,
8th, and 14th Amendment rights under the
U.S. Constitution, Idaho Constitution and
expanded and similar rights to due process,
right to confront witnesses, effective
assistance of counsel and the right to
be free of cruel and unusual punishment
gotten from an unfair process.

Prosecutors Bill Douglas, Lansing Haynes
and Joel Hazel perpetrated a fraud upon the
Court. Through suborning false and perjured
testimony, withholding evidence, withholding
exculpatory evidence, planting snitches, withholding
convictions and criminal files of states witnesses,
bolstering false and perjured testimony, stating
their own beliefs as to witness testimony
and defendants guilt, stating prior bad acts
of defendant, stating prior criminal convictions
of defendant, mistating facts and witness
testimony, repeatedly proffering prior bad
acts of defendant from witnesses the L. L. L.

Prosecutorial Misconduct

witnesses to testify, suborned perjury and false testimony through leaking case evidence and other information to bolster snitch testimony and generally engaged in unethical, immoral and illegal conduct before trial, during preliminary hearing, during trial in its entirety including opening and closing statements and during jury selection. There were no eyewitnesses and no physical evidence. Prosecutors relied on testimony from snitches who had a lot to gain through testifying and nothing to lose and individuals who had a strong dislike of Gerald Barcella or his actions. Trial testimony is rife with inconsistencies, falsehoods and perjured statements.

TAKE JUDICIAL NOTICE OF UNDERLYING CRIMINAL FILE INCLUDING TRANSCRIPTS

Prelim p. 481, 485-9 The Judge talks about credibility issues of the witnesses and inconsistent testimony.

Trial p. 1432, 219 - p 1433, 21-3 The District Court noted Barcella's conviction depended on the testimony of the state witnesses. There were

Prosecutorial misconduct

no eyewitnesses nor physical evidence.

Prosecutors subornation of perjury and failure to correct known perjured and/or false statements is documented throughout trial. In addition to this section of petition also see -

False and Perjured Testimony:

Rikki Bebo

Kenneth Wayne Throft

Virginia Wylene Smeltzer

Norman Bennett

Peter Cooper

Brad Dahey

Officer John Kelly

George Lane

Officer Christie Wood

Robert Agostolico

Prosecutors conduct before, during trial and during sentencing phase shocked the mind, offend at sense of justice and runs counter to the decencies of civilized conduct. Prosecutors played who's the sneakier lawyer
T.p. 1195, 21-p 1196, 21-8.

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Prosecutors have an obligation to put on a fair
T.p. 1195, 21-p 1196, 21-8.

Prosecutors Suborned Perjury and
false testimony and failed to correct it

Take judicial notice of underlying criminal
file including transcripts

See False and Perjured Testimony
sections in this petition of:

Rikki Bobo

Kenneth Wayne Thriet
Virginia Wyline Smeltzer

Off. John Kelly

Off. Christie Wood

Brad Bahey

Norman Bennett

Peter Cooper

Robert Agrifoglio

George Lane

CHAPTER 54

PERJURY AND SUBORNATION OF PERJURY

SECTION.

- 18-5401. Perjury defined.
 18-5402. Oath defined.
 18-5403. Oath of office — Portion relating to future duties not included.
 18-5404. Irregularity in administering oath no defense.
 18-5405. Incompetency of witness no defense.
 18-5406. Ignorance of materiality no defense.
 18-5407. Deposition, when complete.
 18-5408. Unqualified statement of unknown fact.

SECTION.

- 18-5409. Punishment for perjury.
 18-5410. Subornation of perjury.
 18-5411. Perjury resulting in execution of innocent person.
 18-5412. Defendant's testimony may be used to prove perjury.
 18-5413. Providing false information to law enforcement officers, government agencies, or specified professionals.
 18-5414. Intentionally making false statements.

18-5401. Perjury defined. — Every person who, having taken an oath that he will testify, declare, depose, or certify truly, before any competent tribunal, legislative committee, officer, or person in any of the cases in which such an oath may by law be administered, wilfully and contrary to such oath, states as true any material matter which he knows to be false, is guilty of perjury. [I.C., § 18-5401, as added by 1972, ch. 336, § 1, p. 844; am. 1995, ch. 232, § 5, p. 787.]

Compiler's notes. A former section, which comprised Cr. & P. 1864, § 90; R.S., R.C., & C.L., § 6478; C.S., § 8160; I.C.A., § 17-906 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

Section 14 of S.L. 1972, ch. 336 declared an emergency and provided that the act should take effect on and after April 1, 1972.

Sections 4 and 6 of S.L. 1995, ch. 232 are compiled as §§ 67-410 and 67-411A, respectively.

Section 7 of S.L. 1995, ch. 232 declared an emergency. Approved March 20, 1995.

Cross ref. Electoral qualifications, swearing falsely as to, after challenge, § 18-2302.

Informer in bribery cases may be prosecuted for perjury, § 18-1308.

Punishment for perjury, § 18-5409.

Voters, swearing falsely as to electoral qualifications after challenge, § 18-2302.

See subdivision "perjury" in table of cross references to penal provisions in other volumes at the end of this volume.

Sec. to sec. ref. This section is referred to in §§ 18-5403, 18-7803.

This chapter is referred to in §§ 19-2716, 67-411A.

ANALYSIS

Consolidated actions.
 Material matter.

Subornation of perjury.
 Sufficiency of indictment.

Consolidated Actions.

Where, at the beginning of a civil contempt proceeding based on the defendant father's failure to pay child support, the magistrate made it clear that he was going to treat a companion reciprocal action as being consolidated with the contempt action, and the defendant father failed to object to the consolidation, the father continued to be answerable for the oath that he gave during the contempt proceeding; thus, the father's conviction of perjury based upon an untruthful answer that he gave in the reciprocal action was valid even though the oath was not readministered to him prior to his testifying in the reciprocal action. *State v. Aguilar*, 103 Idaho 578, 651 P.2d 512 (1982).

Material Matter.

Statements made in an examination under oath of a defendant in a presentence hearing after a plea of guilty are "material matters." *State v. Martinez*, 89 Idaho 232, 404 P.2d 573 (1965).

That defendant was in Payette, Idaho, on July 4, and not in Ft. Worth, Texas, as he had testified, was material to the issue of his guilt at his lewd conduct trial, even though Payette was still miles away from the location of the alleged crime. *State v. McBride*, 123 Idaho 263, 846 P.2d 914 (Ct App. 1993).

A false statement usually will support a charge of perjury if it is material to any

proper point of inquiry, and if it is calculated and intended to bolster the witness' testimony on some material point or to support or attack his credibility. *State v. McBride*, 123 Idaho 263, 846 P.2d 914 (Ct App. 1993).

Subornation of Perjury.

The offense of suborning perjury is comprised of a corrupt agreement to testify falsely, followed by the willful giving of material testimony which the witness and procurer know to be false; thus, attempted subornation couples an intent to procure material and false testimony with the act of soliciting an agreement to testify falsely, although such testimony ultimately is not given. *State v. Gibson*, 106 Idaho 491, 681 P.2d 1 (Ct. App. 1984).

Sufficiency of Indictment.

Indictment for perjury which states that defendant on his oath "falsely, wickedly, and feloniously did say, swear, etc." is sufficient without the word "knowingly." *Territory v. Anderson*, 2 Idaho (Hasb.) 573, 21 P. 417 (1911).

Collateral References. 60A Am. Jur. 2d, Perjury, § 1 et seq.

70 C.J.S., Perjury, § 1 et seq.

Fear or compulsion, false statement made under, as perjury. 4 A.L.R. 1319.

Aliens, perjury as ground for collateral attack on order admitting to citizenship. 6 A.L.R. 410.

Perjury in verifying pleadings. 7 A.L.R. 1283.

Attorneys, commission of perjury as ground for disbarment or suspension of. 9 A.L.R. 200; 43 A.L.R. 110.

Privilege against self-incrimination as affecting admissibility in prosecution for perjury of testimony given before grand jury. 27 A.L.R. 151.

Entrapment to commit offense. 66 A.L.R. 508; 86 A.L.R. 263.

Evidence, admissibility in prosecution for perjury of judgment in civil case. 87 A.L.R. 1267.

Marriage license, perjury as predicated upon statements upon application for. 101 A.L.R. 1263.

Administrative requirement, oath taken in pursuance of, as predicate for criminal offense of perjury. 108 A.L.R. 1240.

Procuring perjury as contempt. 29 A.L.R.2d 1157.

Materiality of testimony assigned as perjury as questioned for court or jury. 62 A.L.R.2d 227.

Subornation of perjury prosecution: Admissibility of evidence of alleged perjurer's plea of guilty to charge of perjury. 63 A.L.R.2d 825.

Correction of false testimony, effect of, or of attempt to make. 64 A.L.R.2d 276.

Recantation as defense in perjury prosecution. 64 A.L.R.2d 276.

Statement of belief or opinion as perjury. 66 A.L.R.2d 791.

Circumstantial evidence, conviction of perjury where one or more of elements is established solely by. 88 A.L.R.2d 852.

Perjury or false swearing as contempt. 89 A.L.R.2d 1258.

Actionability of conspiracy to give or to procure false testimony or other evidence. 31 A.L.R.3d 1423.

Invalidity of statute, or ordinance giving rise to proceedings in which false testimony was received as defense for prosecution for perjury. 34 A.L.R.3d 413.

Offense of perjury as affected by question relating to jurisdiction of court before which testimony was given. 36 A.L.R.3d 1038.

Incomplete, misleading, or unresponsive but literally true statement is perjury. 69 A.L.R.3d 993.

What constitutes corruption, fraud, or undue means in obtaining arbitration award justifying avoidance under state law. 22 A.L.R.4th 366.

18-5402. Oath defined. — The term "oath" as used in the last section includes an affirmation, and every other mode authorized by law of attesting the truth of that which is stated. [I.C., § 18-5402, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised Cr. & P. 1864, § 90; R.S., R.C., & C.L., § 6479; C.S., § 8161; I.C.A., § 17-907 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

Informal Oath Sufficient.

Testimony of deputy that after he had signed the complaint the justice asked him "if that was the true facts as I knew it" and in answering that it was he felt in conscience he had taken on the obligation of the oath, was a sufficient compliance with the former statute

even though there was no formal administration of the oath, the deputy not having raised his hand or taken a verbal oath to the truth of

the statements made in the complaint. *State v. Parker*, 81 Idaho 51, 336 P.2d 318 (1959).

18-5403. Oath of office — Portion relating to future duties not included. — So much of an oath of office as relates to the future performance of official duties is not such an oath as is intended by the two (2) preceding sections. [I.C., § 18-5403, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised R.S., R.C., & C.L., § 6480; C.S., § 8162; I.C.A., § 17-908 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972,

and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

18-5404. Irregularity in administering oath no defense. — It is no defense to a prosecution for perjury that the oath was administered or taken in an irregular manner. [I.C., § 18-5404, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised R.S., R.C., & C.L., § 6481; C.S., § 8163; I.C.A., § 17-909 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972,

and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

18-5405. Incompetency of witness no defense. — It is no defense to a prosecution for perjury that the accused was not competent to give the testimony, deposition or certificate of which falsehood is alleged. It is sufficient that he did give such testimony or make such deposition or certificate. [I.C., § 18-5405, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised R.S., R.C., & C.L., § 6482; C.S., § 8164; I.C.A., § 17-910 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972,

and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

18-5406. Ignorance of materiality no defense. — It is no defense to a prosecution for perjury that the accused did not know the materiality of the false statement made by him; or that it did not, in fact, affect the proceeding in or for which it was made. It is sufficient that it was material, and might have been used to affect such proceeding. [I.C., § 18-5406, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised R.S., R.C., & C.L., § 6483; C.S., § 8165; I.C.A., § 17-911 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972,

and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

18-5407. Deposition, when complete. — The making of a deposition or certificate is deemed to be complete, within the provisions of this chapter, from the time when it is delivered by the accused to any other person, with the intent that it be uttered or published as true. [I.C., § 18-5407, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised R.S., R.C., & C.L., § 6484; C.S., § 8166; I.C.A., § 17-912 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972,

and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

18-5408. Unqualified statement of unknown fact. — An unqualified statement of that which one does not know to be true is equivalent to a statement of that which one knows to be false. [I.C., § 18-5408, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised R.S., R.C. & C.L., § 6485; C.S., § 8167; I.C.A., § 17-913 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

Jury Instructions.

A jury instruction which recited the language of this section did not create a conclusive presumption of criminal intent. *State v. McBride*, 123 Idaho 263, 846 P.2d 914 (Ct. App. 1993).

18-5409. Punishment for perjury. — Perjury is punishable by imprisonment in the state prison not less than one (1) or more than fourteen (14) years. [I.C., § 18-5409, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised Cr. & P. 1864; § 90; R.S., R.C., & C.L., § 6486; C.S., § 8168; I.C.A., 17-914 was repealed by S.L. 1971, ch. 143, § 5, effective

January 1, 1972, and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

18-5410. Subornation of perjury. — Every person who wilfully procures another person to commit perjury is guilty of subornation of perjury, and is punishable in the same manner as he would be if personally guilty of the perjury so procured. [I.C., § 18-5410, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised Cr. & P. 1864, § 90; R.S., R.C., & C.L., § 6487; C.S., § 8169; I.C.A., § 17-915 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

Sec. to sec. ref. This section is referred to in § 18-7803.

ANALYSIS

Discontinuance of attempt.
Elements of offense.
Sufficiency of evidence.

Discontinuance of Attempt.

Where the evidence did not establish when, if ever, the subornation attempt actually was discontinued, the jury permissibly could have found that the defendant never withdrew his offer to pay whatever the witness wanted for favorable testimony, and discontinuing the attempt after it had been made and had failed would not take the case outside § 18-306, the

general attempt statute. *State v. Gibson*, 106 Idaho 491, 681 P.2d 1 (Ct. App. 1984).

Elements of Offense.

The offense of suborning perjury is comprised of a corrupt agreement to testify falsely, followed by the willful giving of material testimony which the witness and procurer know to be false; thus, attempted subornation couples an intent to procure material and false testimony with the act of soliciting an agreement to testify falsely, although such testimony ultimately is not given. *State v. Gibson*, 106 Idaho 491, 681 P.2d 1 (Ct. App. 1984).

Sufficiency of Evidence.

Where the evidence in a prosecution for attempted subornation of perjury showed that the defendant had called a witness in a pending felony case against him, had offered the witness a sum of money, and had instructed the witness on how to testify at the criminal trial, the defendant's actions constituted the perpetration of the crime of at-

tempted subornation, not merely the preparation or solicitation of the crime. *State v. Gibson*, 106 Idaho 491, 681 P.2d 1 (Ct. App. 1984).

Collateral References. Entrapment as defense to prosecution for attempted subornation of perjury. 18 A.L.R. 191.

18-5411. Perjury resulting in execution of innocent person. — Every person who, by wilful perjury or subornation of perjury procures the conviction and execution of any innocent person, is punishable by death. [I.C., § 18-5411, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised Cr. & P. 1864, § 90; R.S., R.C., & C.L., § 6488; C.S., § 8170; I.C.A., § 17-916 was repealed by S.L. 1971, ch. 143, § 5,

effective January 1, 1972, and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

18-5412. Defendant's testimony may be used to prove perjury. — The various sections of this code which declare that evidence obtained upon the examination of a person as a witness cannot be received against him in any criminal proceeding, do not forbid such evidence being proved against such person upon any proceedings founded upon a charge of perjury committed in such examination. [I.C., § 18-5412, as added by 1994, ch. 167, § 2, p. 374.]

Compiler's notes. Section 1 of S.L. 1994, ch. 167 contained repeals and § 3 is compiled as § 18-6405.

18-5413. Providing false information to law enforcement officers, government agencies, or specified professionals. — A person is guilty of a misdemeanor if he knowingly gives or causes to be given false information to any law enforcement officer, any state or local government agency or personnel, or to any person licensed in this state to practice social work, psychology or counseling, concerning the commission of an offense, knowing that the offense did not occur or knowing that he has no information relating to the offense or danger. [I.C., § 18-5413, as added by 1995, ch. 275, § 2, p. 923.]

Compiler's notes. Section 1 of S.L. 1995, ch. 275 is compiled as § 32-717C.

18-5414. Intentionally making false statements. — A person is guilty of a misdemeanor if he willfully and intentionally gives or causes to be given false information to any court, court personnel, court clerk or any state or local government agency or personnel in the application or request for a domestic violence protective order pursuant to chapter 63, title 39, Idaho Code. [I.C., § 18-5414, as added by 1996, ch. 173, § 1, p. 557.]

Prosecutorial Misconduct

Pretrial Motion; Tr. p 35 - p 37, 41-16 At pretrial the defendant asked that prior bad acts of defendant be barred from use at trial. The judge said these would be addressed as they came up.

The prosecution jumped in at trial and in opening argument and throughout trial the prosecution brought forth prior bad acts and convictions of defendant Tr. p 262, 46-11, 77.

Pretrial Motion Tr. p 55-19 - p 57, 41-17 The prosecution illegally and immorally planted jailhouse snitches in cells and living areas adjacent to and/or near defendant particularly Ken Dawson. The states entire case was testimony from snitches.

Prelim. Tr. p 2, 4-8 - p 5, 41-11 The prosecution tried to get the judge to allow Detective Michael Wolf to stay in the courtroom despite Det. Wolf being one of the main investigators in the case.

The same did occur with Sgt Charles Frite Wolf's partner who also worked on the case disallowing the defense from calling Frite to question him thereby ~~prejudicing~~ prejudicing him and also allowing Frite to hear witness testimony for the state.

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Witness testimony for the state did not

Prosecutorial misconduct

match at preliminary hearing but later did more-so at trial.

Prelim Tr p 72, L 17-25, p 73 L 1-11 Prosecution at trial insinuated victim had problems with defendant. The truth was proffered by George Christman that Ken Thrift was often at Bill Smith's door arguing loudly with Smith.

Prelim Tr p 93, L 3-4 Agrifolio lies on the stand about his record. The prosecution knew Agrifolio's record yet did nothing to stop this.

Prelim Tr p 353 L 15-20 Prosecutor allowed perjured testimony of Ken Thrift that he only had 2 felony convictions and they were for drunk driving. Thrift in fact had 94 arrests and at least 42 felony convictions. The prosecution never disclosed Thrift's criminal file nor told defense Thrift lied on the stand.

Prelim Tr p 418, L 21 - p 423 L 1-14 The prosecution didn't list Sgt Charles Fritz on witness list so Fritz could hear witness testimony at preliminary hearing. State's witnesses had many more inconsistencies at prelim hearing than at trial. Defense was also not able to cross-examine Fritz at prelim hearing so they wouldn't know what he would say at trial.

Prosecutorial misconduct

The prosecution repeatedly put on witnesses out of sync with the witness list given to the defendant to throw off defense attorneys and have them appear unprepared.

T.p. 557, L. 6-16 Prosecutors used a photo lineup in which a bright red circle is drawn around the defendant.

T.p. 541-p. 554, L. 1-7 If the prosecution wanted to give the defendant a fair trial they would have told defendant of witness Ken Thrift's 94 arrests and 42 prior felony convictions and allowed defendant to tell the jury of such to impeach Thrift's testimony.

T.p. 606, L. 9-18 The defense was prejudiced by not being allowed to inquire into Thrift's prior mental health records or inquire into why Thrift is on disability. Thrift is severely mentally handicapped.

T.p. 961, L. 4-6 The prosecution purposefully had defendant's trial just before Christmas so the jury would hurry in finding defendant guilty to be free for holiday functions. Judge Bengsten says "And I have recently rather blatantly been assigned to preside in this case, even though I have retired about a year ago."

Prosecutorial Misconduct

The prosecution supported, encouraged and bolstered the perjured and false evidence of Ken Thrift. Thrift admitted he only went to police after Rikki Bobo talked him into it Prelim Tr. p 355, L 7-10. The prosecution did not give the defense Thrift's criminal record of 94 arrests and at least 42 felony convictions and let Thrift lie on the stand at the preliminary hearing that he only had 2 felony convictions. (for drunk driving). Prelim Tr. p 353, L 15-20. Thrift's testimony at trial and preliminary hearing and in police interviews repeatedly contradicts itself and is shown to be false by testimony of Rikki Bobo, Peter Cooper, Brad Barkey and others.

Ken Thrift passed a lie detector test that asked him if he knew anything about Barcella committing the crime and he answered no. Prelim Tr. p 358, L 21 - p 359 L 1-10

Thrift was one of two main witnesses against Barcella and without his testimony defendant would not have been convicted.

The prosecution knew Thrift's testimony was disputed by several other state's witnesses and Thrift was the last person known

to be with Bill Smith before he died.
Prelim Trp, 399, 124 - p 401, 21-14 Cpt. Charles Bergh
also talks about Thrift taking a lie
detector test. Although lie detector tests may
not or may be admissable in court does not
detract from the fact that Prosecutors knew
Thrift was lying as he passed the test he
knew nothing of Buccella killing Smith.

At the end of the preliminary hearing the
judge talked about inconsistencies of the State's
witnesses and their credibility.

See preliminary hearing transcript page 336
through page 380 and Trial Transcript page
541 through page 607, trial discovery including
police interviews and lie detector test of
Kenneth Wayne Thrift, Ken Thrift Criminal
file,

See in this petition false and perjured Testimony
of Kenneth Thrift

11. The acts and omissions of the prosecution and state constitutes "prosecutorial misconduct" which has deprived Petitioner of a fair and impartial trial guaranteed by both state and United States Constitutions.

12. Such prosecutorial misconduct violated Petitioner's secured rights to due process and equal protection of the law which is guaranteed by both state and United States Constitutions.

13. Prosecutorial misconduct occurred and happened throughout the course of the entire proceedings as set forth herein.

PETITIONER'S FACTUAL ALLEGATIONS

14. Prosecutorial misconduct happened during the course of jury selection. Tr.T. P. 163, L. 25; P. 164, L. 1-8.

15. The prosecution withheld evidence from Petitioner which constitutes a "BRADY" violation. Tr.T. P. 359, L. 16-25; P.360; P. 361; P. 362, L. 1-23.

16. The prosecution withheld the identity of a witness whereby Petitioner was prejudiced as he was unable to interview the state's witness until after the trial had already proceeded. Tr.T. P. 363, L. 3-25; P. 364; P. 365; P. 366; P. 367, L.1-11.

17. Prosecutor Lansing Haynes suborned and allowed perjured testimony in proffering testimony of Sgt. Charles Fritz that Kenneth Wayne Thrift was with Petitioner during the late evening of 4/2/95 and the early hours of 4/3/95. Contrary to testimony of Peter Cooper, the police interviews of Peter Cooper, Brad Bakey's testimony, the police report of Cpt. Charles Burgh. . .PSI and the testimony of

Rikki Bobo. Tr.T. P. 1530; 1531; 1532; 1533.

18. Prosecutor Haynes misstated the testimony of Angelo Barcella that Petitioner Gerald Barcella had moved to Idaho in the 1980's and further took advantaged of Angelo Barcella because of his hearing impairment. Tr.T. P. 1552, L. 22-25; P. 1553, L. 1-3.

19. Prosecutor Haynes knowingly and willingly misled the jury and misstated facts not in evidence when he stated to the jury that Petitioner's witnesses did not know the Petitioner's character in Idaho and portrayed Petitioner as being gone from his "home state" for approximately ten (10) years when in fact, Petitioner had been away from his "home state" for less than one (1) year. Prosecutor Haynes knew that such facts were false and misleading from previous statements, testimony and a vast amount of documentation in the state's possession. Tr.T. P. 1443, L. 13-25; P. 1444, L. 1-9.

20. Prosecutor Haynes attempted to mislead the jury by having one of the state's witness's misstate facts concerning discovery that was made available to Petitioner in April 1995 during a firearm case. Prosecution attempted to mislead jurors and present false evidence by stating Petitioner had knowledge of the crime and asserting Petitioner did not have this discovery. Petitioner refers this Court to the signed affidavits of attorney Ruben Iniquez and Investigator, Gabe Cabbellero. See, Motion for Mistrial/Acquittal [herein on file with this Court]. *also Tr.T. p. 1583, L 12-25, through p. 1587, L 12*

21. Byron Ames established witness tampering and prosecutorial misconduct in that he testified that state witness, George Lane had

been threatened by Lansing Haynes, the prosecutor, thereby forcing and compelling George Lane to be a reluctant witness for the state. Tr.T. Pages 1590.....1602; P. 1603, L. 1-22.

22. Attorneys Suzanna Graham and Glen Walker, corroborated Byron Ames's testimony and further established witness tampering and prosecutorial misconduct on part of prosecutor Lansing Haynes. Tr.T. P. 1630, L. 16-25; Pages 1631.....1662; P. 1663, L. 1-22.

23. The testimony of George Lane corroborated prosecutorial misconduct and witness tampering by Lansing Haynes in that he testified that his attorney of record, Suzanna Graham relayed a message to him from Lansing Haynes. Tr.T. P. 1635, L. 21-25; P. 1636, L. 1-22.

24. Attorney Suzanna Graham testified that her client, George Lane was afraid he was being forced to testify or he would lose his "rider", [Court's retained jurisdiction]. Tr.T. P. 1648, L. 3-13.

25. Attorney Suzanna Graham testified of Lansing Haynes witness tampering and prosecutorial misconduct whereby her client was induced and compelled by the threats of Lansing Hanyes to testify at trial. Tr.T. P. 1650; P. 1651, L. 1.

26. Attorney Suzanna Graham testified that she told Lansing Haynes that she would not put up with his "strong-arm" tactics. Tr.T. P. 1652, L. 3-5.

27. Attorney Suzanna Graham testified that she received an apology from Lansing Haynes for his "strong-arm" tactics to induce and force her client George Lane to testify against Petitioner. Tr. T. P. 1652, L. 23-25; P. 1653, L. 1-14.

about Bakey being a homosexual. This line of questioning would have shown that Bakey had knowingly and willingly lied under oath as his testimony was completely different than his statements in police interviews. Tr.T. P. 939, L. 9-20.

34. Prosecutorial misconduct occurred when Lansing Haynes solicited and encouraged state witness, Peter Cooper to ~~mis~~characterize Petitioner as a "large biker type person with a scruffy beard and weighing over 200 pounds". This prosecutorial misconduct inflamed the jurors emotions and prejudiced Petitioner thus denying him a fair and impartial trial of his peers. Tr.T. P. 617, L. 15-25; P. 618, L. 1-14.

35. Prosecutor Haynes committed prosecutorial misconduct in that he submitted State's Exhibit # 21 showing a photo line-up with a bright red circle around the Petitioner who was in the photo thereby denying him a fair and impartial trial. Tr.T. P. 618, L. 5-9.

36. Prosecutor Haynes suborned the perjured testimony of Peter Cooper in that Cooper's trial testimony was opposite and clearly contradictory of his statements in police interviews and the Preliminary Hearing all of which information Haynes knew of and had documentation of and in so having this knowledge allowed perjured testimony to enter into trial denying Petitioner a fair and impartial trail and denying him due process and equal protection of the law. Tr.T. P. 619, L.25; P. 620, L. 1-25; P. 621, L. 1-4. [JUDICIAL NOTICE IS REQUESTED AS TO THE TESTIMONY OF PETER COOPER IN PRELIMINARY HEARING HEREIN ON FILE WITH THIS COURT].

37. Peter Cooper was testifying in the negative and, when he
PETITION FOR POST CONVICTION RELIEF. . . . PAGE 7.

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was interrupted by the judge, knowingly committed perjury and changed his answer to "yes". Petitioner was denied a fair and impartial trial due to prosecutorial and judicial misconduct. Tr.T. P. 619, L. 25; P. 620, L. 1-6.

38. Peter Cooper knowingly and willingly committed perjury under oath and Lansing Haynes allowed such to go uncorrected when knowing the same to be false testimony. Compare: Tr.T. P. 621, L. 11-13 with P. 619, L. 25; P. 620, L. 1-10.

39. Prosecutor Haynes solicited impermissible testimony of Peter Cooper thereby committing prosecutorial misconduct. Tr.T. P. 622, L. 25; P. 623, L. 1-5.

40. Prosecutor Lansing Haynes knowingly and willingly committed prosecutorial misconduct and BRADY violations in that he knowingly and willingly withheld certain pieces of evidence from Petitioner and his attorney. Such evidence include but, was not limited to, test results, police interview transcripts, and photographs despite the numerous and repeated discovery requests as well as Haynes legal duty and obligation to provide ALL DISCOVERY to Petitioner and his attorney. Such knowing and willing actions on part of Lansing Haynes deprived Petitioner and denied him due process and equal protection of the law. Tr.T. P. 1162, L. 1-25; P. 1163, L. 1-4.

41. Prosecutor Haynes repeatedly solicited and introduced highly prejudicial and impermissible testimony concerning "bad acts" which included, but was not limited to, Petitioner allegedly carrying a sawed-off shotgun, hatchet, and a large knife the day of Bill

Smith's death.

These actions on part of Lansing Haynes violated Idaho Rules of Criminal Procedure, clearly established law and was highly prejudicial and inflammatory as well as being impermissible which denied Petitioner a fair and impartial trial and denied Petitioner due process and equal protection of the law and constituted a clear case of prosecutorial misconduct on part of Lansing Haynes.

Tr.T. P. 1200, L. 21-25; P. 1201, L. 1-25. JUDICIAL NOTICE IS REQUESTED AS TO THE FULL TRIAL TRANSCRIPTS AND LANSING HAYNES' ACTIONS.

42. In the opening statment Lansing Haynes committed prosecutorial misconduct in that his opening statement contained "bad acts" of the Petitioner; i.e. Wylene Smeltzes saw Petitioner in a bar the night of Bill Smith's murder with a duffel bag containing a hatchet, sawed-off shotgun and wearing a large knife at the back of his pants. The Petitioner had previously filed a Motion in Limine before Judge Haman concerning "bad acts" and at that time, Judge Haman stated such Motions would be dealt with as they came up. However, Judge Haman was replaced by Judge Bengsten and Lansing Haynes knowing of the previous ruling committed fraud upon the Court by his underhanded and unethical tactics denying Petitioner a fair and impartial trial. Tr.T. P. 261, L. 18-25; P. 262, L.1-9. *pretrial motions p.*

43. A cumulation of errors through prosecutorial misconduct occurred during the closing argument of Lansing Haynes. The errors include, but are not limited to, falsehoods, half-truths, withholding evidence, misstating the evidence, mischaracterizing the evidence, placing his own opinions before the jury thereby becoming an unsworn

witness, misstating and mischaracterizing the testimony of the witnesses, misstating the facts and alluding to evidence not even entered in at trial, giving his own personal opinions about the evidence, the veracity of the witnesses, bolstering the truthfulness of the witnesses and evidence through his own personal beliefs and vouching which played upon the jurors emotions and inflamed them thereby prejudicing the Petitioner a fair and impartial trial and denied him due process and equal protection of the law. Tr. T. Pages 1721.....1800. JUDICIAL NOTICE IS REQUESTED OF TRIAL TRANSCRIPT PAGES

HEREIN CITED AND REFERRED TO. *Take judicial notice of underlying criminal file including transcripts.*

Prosecutorial Misconduct

Trial p 277, L 20 - p 281, L 1-21 Prosecution solicits highly prejudicial, undisclosed false statement allegedly made by defendant to Officer John Kelly. This alleged statement was never disclosed in police reports or at preliminary hearing.

T.p 283 L 10 - p 284, L 1-8 Officer Kelly now refutes the highly prejudicial testimony he just gave insinuating defendant had prior knowledge of crime and was playing dumb.

T.p 285, L 15 - p 286, L 1-6 It is obvious here that the prosecution knew what the witness would say. Unethical solicitation of false and undisclosed testimony

T.p 318, L 1 - p 322, L 1-18 Defense asks Judge Bengsten to strike the highly prejudicial testimony.

T.p 322 L 15-20 Prosecutor Joe Hazel says he didn't know what Officer Kelly's response would be. Hazel asserts: "I took a stab at it."

T.p 322 L 10-16 Judge Bengsten concedes defense could have asked for a more drastic solution to Officer Kelly's testimony than to strike testimony

T.p 343, L 22 - p 352, L 1-22 Officer Greensides testifies about statement he took from George Christman about Ken Thrift being the person who was always arguing with Bill Smith. Prosecution put Thrifts bad actions on Barcella to get conviction

Prosecutorial misconduct

Tr. p 1184, L 24 - p 1185 L 12 Prosecution solicited prior bad acts from George Lane that Gerald Barcella had shot 2 people and had gotten away with it and would get away with Bill Smith's murder

Tr. p 1659 L 15 - p 1660 L 17 Prosecutor threatened Robert Agrifoglio to testify

Tr. p 1347, L 15 - p 1350, L 11 Prosecution had Agrifoglio's prelim testimony read to jury although Agrifoglio told Investigator Mark Durant he pleads the 5th when asked if he lied at prelim hearing.

Tr. p 680, L 16 - p 681, L 14 State wouldn't allow Barcella to inquire into Bobo's incarceration at time of trial

Tr. p 680, L 16-25, p 683 L 2-5 Prosecution bought clothing and makeup for Bobo at her testimony to deceive jury that Bobo was not a prisoner. Defendant couldn't inquire into her custody

Tr. p 536, L 7-10 Prosecution withheld Kenneth Thrift's criminal file of 94 arrests and 42 felony convictions

Tr. p. 1201, L 7 - p 1206 L 21 Barcella asked for mistrial

Tr. p. 1432, L 19 - p 1433, L 1-3 The Court noted Barcella's conviction rested on credibility of witnesses

In the courtroom after Gerald Barcella's trial Bill Smith's best friend, employer and surrogate son told Barcella: "I don't know if you killed him or not but you sure got screwed". This is Robert Healey 141

Prosecutorial misconduct

See issues in Appellants Brief

See 2000 Opinion 64 Response
from Idaho Court of Appeals

See Appellants Brief in Support of
Petition for Review

see Appellants reply Brief

Prosecutorial Misconduct

T.p. 493 - p. 495, 21-14 The prosecution "used the backdoor" to get in suborned testimony from Virginia Wylena Smeltzer that Bill Smith was a friend of Gerald Barcella although Smeltzer said Smith never used Barcella's name T.p. 484, 22 - p. 496, 21-3 and she was caught lying to as such and police reports of George Christman prelimp. 721, 21-7 - p. 731, 21-11 show Ken Throft was the person Bill Smith was scared of and testimony of Rikki Bobo Tp 800 214-801, 210 that she was with defendant when he found "note from Bill" and wasn't upset and testimony of Rikki Bobo Tp. 804, 216 - p. 805, 21-3 that Peter Cooper was trying to rent her and Barcella a bigger apartment after Bill Smith's death show there were no problems between Smith and Barcella of any portent. If Smith had been scared of Barcella he would have certainly told Peter Cooper.

Prelimp. 35 - p. 37, 21-16 prosecution contended they would hold a hearing should they choose to put forth prior bad acts of defendant. At trial prosecution started revealing prior bad acts of defendant in opening statement and continued throughout trial. 143

Prosecutorial misconduct

In his closing statement T.p. ¹⁷⁶² 9-11 Prosecutor states Barcella's appearance was changed to deceive the witnesses. Atty Adams even told Kenneth Thrift, That is Garry right there T.p.

Haynes likes to lie and misstate facts.

Haynes told the jurors: "He looks so different they couldn't even recognize him".

T.p. 1762, 412, 13. A blatant lie. Barcella's witnesses visited him in County jail before the trial. They all most certainly

recognised him. Prosecutors violated Barcella's 5th amendment right. Haynes took unethical advantage of Barcella not putting on a character defense, which Judge Bengsten said would open the doors to any and all prior bad acts, arrests and felony and misdemeanor

convictions T.p. 1462, 415-18 Haynes told jurors: "This is what went on out in Idaho.

Those people didn't know anything about what he was doing out here. They didn't know anything about him out here." Barcella was only gone

from Connecticut for less than one year and he kept in weekly contact with family see P.S.I (phone bill).

and regular contact by phone with his friends See 106 P.S.I (phone bill) and credit report

Prosecutorial Misconduct

Haynes continued: "They didn't tell you anything about him other than he has a father, he has a sister. He has friends. Murderers have fathers. They have siblings. They have friends."

Tip 1762, 18-10 Lansing Haynes tells jury Barcella changed his appearance to deceive the witnesses. Barcella was fed a restricted diet and held in solitary for most of the 13 months preceding trial. Barcella lost 125 lbs. due to lack of food and because he was overweight before that. Barcella cut his hair at attorney Adams request. Barcella was brought with mental and physical anguish over facing execution and a murder trial.

The prosecution illegally planted jailhouse snitches to testify against Gerald Barcella. See Kootenai City v. White #8 (08-30-97) at affidavit of James Moehn and Rick Gross. The prosecution's use of planted snitches included Kenneth Dawson who had 65 arrests and served no prison time and was planted in every jail pod in a 72 hour period to secure false confessions of 4 murder dates. 2-

Prosecutorial misconduct

Prosecutors got highly prejudicial, non probative information not in evidence before jury that Barcella had a duffel-bag and large knife with him at the Watrous Hole Bar on 04-02-95 T.p. 499, L. 14-21 to reinforce contention by prosecutors in opening statement Barcella had a duffel-bag with a hatchet, and sawed off shotgun in it in their opening statement T.p. 262, 26-9. Using witness identity to get in this testimony is blatantly unethical T.p. 499 L. 7-9 and had no purpose. Prosecutor was in fact testifying and lying

on T.p. 571, L. 1-2

Q. And to smoke cigarettes?

A. Right.

Prosecutors led their witness and suborned perjury. Barcella quit smoking in 1989.

Prosecutors needed this information so they could have Thirft lie to jurors that he saw Barcella outside Bill Smith's door

T.p. 571, L. 1-5

Prosecutors lied to jurors implying Barcella had a sawed-off shotgun. Barcella's arrest reports and sentencing for felon-in-possession of a firearm show Barcella's two shotguns were not altered or sawed off

Prosecutorial Misconduct

Prosecutors gave information not in evidence to jurors that was highly prejudicial and non-probative T.P. 262, 46-9

Prosecutor Joel Hazel unethically told jurors "In addition, Ms. Smeltzer will tell you that she had to have the defendant remove a duffel-bag^{which} contained a hatchet, a sawed-off shotgun, and the defendant was carrying around a large knife in the back of his pants". This was also a lie by prosecutors.

Prosecutor Hazel also told jurors on T.P. 262, 410-11

"Eventually the defendant and his group were kicked out of the watering hole."

This was also not in evidence and a lie! No one else told police this

Prosecutors again unethically insinuated to and sought information not in evidence to be brought in by

Kenneth Thirft that Berella allegedly had a duffel-bag containing a sawed-off shotgun, hatchet and Berella had a large knife in the back of his pants

T.P. 564, 46-16 The jurors were again reminded of the alleged duffel-bag with shotgun

Prosecution proffered highly prejudicial, non-probative testimony by Det Wolf concerning information not in evidence and had undisclosed evidence in the courtroom concerning a hatchet allegedly owned by Baratta suggesting, as Judge Bengsten said, that "he's (Barcella) some sort of axe murderer."

T.p. 1109 - p 1113, 21-20

Prosecutorial Misconduct

Kootenai Cty Sheriff's Dept personnel and/or Coeur d'Alene police officers followed, spread on and tried to purchase drugs from Barcellas character witnesses while in the lounge/restaurant area of their motel, the Coeur d'Alene Inn.

Affidavits of witnesses will be added at a later time.

Take judicial notice of underlying criminal file including transcripts

Prosecutors were argumentative and snotty and tried to intimidate Mr. Barcellas witness his sister Lori Ann StJorre during her testimony T.p. ~~1448~~ 1448, 218-p 1449 21-6

Affidavit to be added later

Unfortunately tone and volume of voice cannot be transcribed

Prosecutorial Misconduct

Prosecutors unethically justified bringing up highly prejudicial, non-probative prior bad acts of Barcella saying defense attorneys had the bad acts in discovery and did nothing to preclude them. T.p. 1195, 410-18 no-court order.

Judge Bengsten said if he were a defense attorney he'd be shocked by the proffered bad acts. T.p. 1195, 419-21

Judge Haman denied Barcella's request to preclude prior bad acts. T.p. 1195, 425-p 1196, 41-7

Prosecutors unethically used prior bad acts to prejudice and convict Barcella.

Defense attorneys again talked about motion to preclude 404 bad acts. T.p. 1203, 417-p 1204, 41-8

Prosecutors played whos the sneakier lawyer and they won.

Prosecutors unethically objected to and interfered with testimony and presentation of expert witness Danny Smith, P.H.D.

T.p. 1505, 41-p 1521, 41

Prosecutorial misconduct - Closing

Prosecutors used the bully pulpit of Closing argument to state facts not in evidence and to misstate facts. The magnitude of the prejudicial effects of prosecutors' inappropriate and harmful statements effected the jury's decision. Prosecutors injected their own opinions in closing arguments. Prosecutors misstated witness testimony.

Prosecutors lied to jurors that witness Aguilera testified Barcella told him he wiped off the door knob. This is a lie T.p. 1751, 421-28 Never testified to.

Prosecutors lied Barcella's witnesses didn't recognize him T.p. 1762, 412-13 and Barcella changed his appearance to deceive jurors T.p. 1762, 49-11

Barcella's witnesses visited him the ~~day~~^{night} before they came to court. Barcella lost 125 lb on a restricted diet along with worry after 1 year in jail.

Prosecutors contended Barcella had prior knowledge of the crime T.p. 1746, 414-422 despite fact Barcella saw crime scene just previous.

Prosecutors suborned and bolstered false testimony of Kenneth Thrift T.p. 1742 41-11 despite testimony of Brad Baker, Kiki Bobo and police reports of Cpt Charles Bugh and police interview of William Solberg showing Thrift lies.

Prosecutors lied to jurors Barcella
Confessed to Bobo over the phone

Tip. 1742, 21-4 The phone call was
made at least an hour before Barcella
reached 205 Indiana and Bobo NEVER
said such. Another lie by prosecutor

Prosecutors called Barcella's defense a
"phony smokescreen defense" Tip. 1759 - p. 1760 21-18

Prosecutors contacted defense attorney, lied to jurors

Tip. 1743, 23-7

Prosecutors slandered testimony of Barcella's
witnesses Tip. 1761, 220-p 1762 21-2

Prosecutors sought inadmissible evidence that
had to be stricken during testimony of
V. Wythe-Smeltzer, Kenneth Threlft, Peter Cooper,
Off John Kelly and Det Mike Wolfe.

Prosecutorial misconduct - closing

- 44) Tr p 1725 L 2-4 prosecutor tells jurors victim's wounds show premeditation. This is personal opinion and doesn't match evidence and testimony of pathologist George Lindholm. Tr p 1049 L 2-4, Tr 1054 L 8 - p 1055, L 1-18
- 45) Tr p 1736 L 11-20 Prosecution backs false testimony of Ken Throck which is shown to be false through police interviews and testimony of Rikki Bobo, Brad Bahey and Bill Solberg
- 46) Tr p 1743 L 3-17 Prosecutor tells the jurors people see things differently to back up false and perjured testimony of approximately fifteen of the state's witnesses
- 47) Tr p 1742 L 3-11 Prosecution distorts facts to jury. Defendant had no reason to lie to Rikki Bobo he was at a bar in Rathdrum before crime was alleged.
- 48) Tr p 1751 L 18-25 Prosecution distorts facts that a double-headed axe is a polaski. A double headed axe is a logger's axe. It is vastly different than a polaski although a layman may not know this.
- 49) Tr p 1752 L 3-12 Prosecution reiterates and reinforces testimony of Aguilino that defendant thought victim had killed his puppy despite testimony of Rikki Bobo showing it to be false.

Prosecutorial Misconduct - closing

- 50) T.p. 1743, 43-7 Prosecution contends defense attorneys lied when they told jury Bobo and Thrift concocted their story to tell the jury.
- 51) T.p. 1749, 218-22 Prosecution mistakes facts and testimony to make defense attorneys appear as liars through preliminary hearing testimony of Robert Agrifolia let in at trial.
- 52) T.p. 1757, 49-10 Prosecution contends George Lane got nothing for his testimony. Lane was facing approximately twenty eight years in prison plus possible habitual offender charge that carries a life sentence yet received his second "rider" which is illegal by Idaho law.
- 53) T.p. 1759, 417-19 Prosecutor contends George Lane and Robert Agrifolia got nothing for their testimony. Agrifolia was declared unavailable and his testimony read into the record. Deceiving on prosecution's part.
- 54) T.p. 1759, 420-23 Prosecutor tells jurors that defense put on was "phony smokescreen defenses."
- 55) T.p. 1760, 418 "That's what I mean by phony defenses". Again prosecutor contends defense attorneys are liars.
- 56) T.p. 1761, 420 - p. 1762, 41-21 Prosecutor states defendants witnesses proffered no character testimony only that they were friends or family of defendant. Judge Bengsten limited defendants witnesses in

If you have any comments or questions
call or write me, Paul Hackett
352 New Britain Rd
Berlin CT 06037
Good luck

May 28, 1997

To whom it concerns:
I have known Henry Barrella for
about 20 years. I met Henry and his
family through his brother William (Bill).
Henry has a natural talent working
with his hands. He has worked in all
carpentry business and is meticulous
about the details. In starting a project
Henry likes to see the end result.
Henry's hobbies are fishing and trapping.
He had often mentioned in the family
trapping business and even wrote a
couple of books about trapping.
Henry has always loved the outdoors,
whether it be fishing or camping.
In knowing Henry all these years
he has always been there when I
needed a friend. He is someone I can
count on. I have never known Henry
to investigate trouble but knew if trouble
came his way he could take care of
himself.

Paul H. Hark

Paul Hark

October 21, 1997

To whom it may concern,

I have know Gerry Barcella since the late 1970's. As a friend of my older brother's, he has participated in family functions, i.e. weddings, barbecues, and birthday parties. I even attended a political social function with Gerry during 1982, as his date. I have met his parents and brother and sister. They are wonderful people. His father and I worked for the same company until he retired.

Gerry has been a friend to me and my family, always showing respect to my father, as well as to each of my brothers and sisters. I have never seen Gerry become angry and violent. He has always shown me humor and kindness.

I have not seen Gerry during the past five or so years since he moved out west, but I can't imagine him becoming radically different from the man I knew. I can see where people may form a negative opinion of him because of his size and tattoos, but if you get to know him, you see who he really is: a person who is smart, loyal, funny, considerate, and human.

From what I understand, Gerry is going to be on trial for murder. I hope that the people who are involved in the prosecution focus on the facts, not perceptions and rumors. That is what real justice is based on.

I also want to say that I am against capital punishment.

Sincerely,

A handwritten signature in cursive script that reads "Andrea A. Forgione". The signature is fluid and written in dark ink.

Andrea A. Forgione

Peter A Day
P.O. Box 3868
Pocasset MA 02559
(508)564-6446

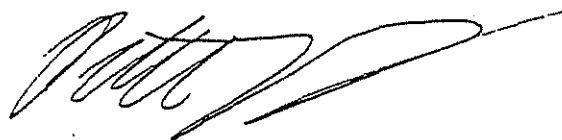
who It may concern

I'm writing In regards to my long time friend Gerald A Barcella grew up with gerry living one block from each other in the rural town of Berlin CT, where we attended school together (Gerry was a year ahead of Myself) and I always looked up to gerry being a year older than myself, After leaving school gerry opened his own trapping supply business, he is a true nature lover as I am myself he taught me how to trap and alot about the outdoors, we often hunted, trapped and hunted together, he is an extreamly talented hunter when it comes to the outdoors.

On my return from duty with the US Army we continued our friendship, as if it time had stood still, gerry and myself both became motorcycle enthusiasts, we spent countless hours working on the bikes as well as touring and sight seeing, eventually we lost contact when he moved out west till I was contacted to write a letter in his behalf!

It is my opinion that Gerry is a decent and respectable person and would stand by his character 110% I look forward to his return to the east coast to continue our long standing friendship.

Sincerely Yours
Peter A Day



2

and very honest. I
have never seen him
lose his temper on or
of the job. I am
sorry to see him in
this trouble, and I
hope everything works
out for him.

Yours faithfully,
Peter Coyle

203-937-7205,

PETER COYLE
369 JONES HILL
RD

WEST HAVEN CT

06516.

4-2-97.

Dear Mary, ⁴his letter is
about Jerry Barcella.
I first met
Jerry at a worksite in
New Haven CT in 1983.
We have been friends
since then. All the time
I have known him, he
was easy to get along
with and I have never
seen him get into trouble
around me, or the friends
I introduced ^{him} to. He was
hard working and reliable

EAR Ms Goody,

I'm writing in reference to Gerry
Laucella. Gerry has always been very courteous
to me and my family. He always has shown
manners & gentleness to my friends & animals.
Although he has a reputation of violence I have
never seen him display that side of him
my presence.

Holly Trench

P.S. We've just moved, so I'm sorry about
the delay in writing. I've just found your
letter. Good luck with Gerry's defense.

P.S.S. Give this Rosemary to Gerry for
Good luck!

October 31, 1997.

To whom it may concern,

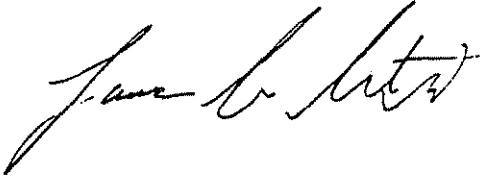
I am writing on behalf of Gerry Barcella. Having known Gerry for quite some time, I was surprised to learn of the current situation, and it has encouraged me to write to you.

Although it has been several years since I have seen Gerry, I find it hard to believe that a man of such strong character could mutate into the sort of person who would commit such an act of which he is suspected.

There was never a moment in which I witnessed hostility or aggression within Gerry. On the contrary, Gerry's actions have always lead me to see him as a man of character. He always treated everyone with respect, and was kind to people. Gerry is a man of old-fashioned values.

In closing, I would like to say that I hope that the people involved with this case strive to see Gerry as he really is, and not what they may initially perceive him to be.

Thank you for your time and attention,

A handwritten signature in cursive script, appearing to read "Lance A. Ceruti".

Lance A. Ceruti

Wednesday, August 20, 1997

I Frank Green have know Gerry Barcella since 1990 and I am writing this letter in behalf of me knowing him, we had gone to AA and NA mtngs together for 3 1/2 yrs, I have known Gerry to be very considerate and understanding man, he has helped me in alot of personal and emotional situations.

I been to Recovery conventions with him many times, meetings, dinners, social events, one of our favorites was working out at the gym together, I have seen Gerry grow in alot of areas in his life to become a productive member of society, very thoughtful and honest to me and other people he did not even know. In my eyes he is a friend a human being and a trustworthy individual. I write this letter to support Gerry in every way praying that God has and will always take care of him.

Signed

Frank Green
21 HART STREET
New Britain CT 06052
860-827-0415

Wednesday, July 09, 1997

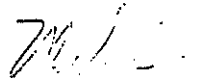
To whom it may concern

I Michael Fields

Do here by am writing a charecter letter on behalf of Gerald Barcella.

I have know Gerry for 15 years and had lived with him for 1 year,we have gone to school together and I went to his house on many occassions,I know Gerry to be a good person whom has a good heart,and goe's out of his way to help people. I have had illness in the past and he was there for me. He is a generous person that gives alot to whoever he meets and will go out of his way to give somebody help for what ever reason,he climbed a mountain one time at night to bring me some food. I am serious. He is a good friend that I owe alot to. And he is a good person inside and out. You cannot judge a book by its cover, hope this will help.

signed



Brian A. Ceruti
101 Barker Lane
Kensington, CT 06037

August 15, 1997

Mary C. Goody
Mitigation Specialist
P.O. Box 508
155 E. Pearl; Lower Level
Jackson Hole, WY 83001-0508

Mary,

Gerry has been a good friend of the family for many years. My family first came to know him through my older brother Rick, who is eleven years older than me. I have known him since I was about ten (I am now twenty-seven years old). When I was younger, he always treated me with respect. I can remember many people not giving me this courtesy at that young age. I always thought of him as another older brother.

He has been to our house and many family gatherings. I have known him to be a very sincere, honest, and respectable person. I only have good things to say about him. He has never done anything in my presence that was out of the character I have described so far.

I hope Gerry is doing well and I look forward to seeing him again.

Sincerely,



Brian A. Ceruti

(MARY,

My phone # is
(860) 228-5453.
My work phone is
(860) 702-8877.

BRIAN)

Guy Grabowski
12900 Starkey Road
Largo, FL 33773

September 30, 1997.

Mary C. Goody
Mitigation Specialist
P.O. Box 508, 155 Pearl Street
Jackson, WY 83001

Dear Mary,

The purpose of this letter is to express my thoughts, opinion and feelings concerning Gerry Barcella.

I met Gerry at a Narcotics Anonymous meeting in December of 1989. We had so much in common that we immediately became friends. We exchanged phone numbers and kept in close contact "working" the twelve steps of the program together. I was able to learn quite alot from Gerry because he had a stronger knowledge and grasp of the program than I.

I have never seen Gerry lose his temper or become violent as long as I've known him. I know in my heart that given the chance, Gerry could be as positive an influence to others as he was to me. In my opinion, Gerry is a very intelligent and caring human being with alot to offer. I also feel that Gerry is very clever and skilled and would have no problem finding employment.

Gerry has always been there for me and my family and I will always be there for him.

Very truly yours,


Guy Grabowski

166 83

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I know Gerry, Gerry's heart, and
goodness. I am not suspect and
is not. But to think of Gerry
is not able to be in the Hummer
population is ludicrous. He is
a good man who's earlier mistakes
caused people to judge him unfairly.
I know I speak for Gerry when I say
that all he'd ever want, I would be
to live in peace in the wilderness,
work hard and eat good. (But not
speaking for Gerry) He could also be
an inspired, determined, sincere,
articulate State Senator!

He's not radical. He's just a man.
He deserves a change at a good
life. Just the simple life that
he wants. I'll never believe that
Gerry is guilty as charged.

Mary J. Balducci

he parked his dad's car and
spent the afternoon with them
up on Madison Mt.

Also, I worked with Gerry for
some time in his remodeling business.
He taught me the ropes and had
patience when I didn't know what
to do, or made mistakes. He was
very professional and cautious to
his clients. He picked me up and
dropped me off home after work.
This was when I was five months
pregnant with my daughter. Also
my husband had no problems with
it. He knows I'm a work horse
and he knew I'd be o.k. with
Gerry. I have never been, and never
will be afraid of Gerry. No body
who really knows him ever
would be. I would just think twice
about leaving my two kids with
him for a week. But I am no
fool, and am extremely over-
protective mother. My instincts
are unbelievably strong.

They knew him, and they knew
my interest in the old way.
Larry would never let me
walk home by myself. He was,
~~is~~ like a brother to me. Once
when Larry, another guy, me and
my girl friend were teenagers,
pulling in Larry's car. The other
guy told Larry (while they were
just relieving themselves) that
he was going to rape me. Larry
gave him an unconditional "NO".
And that was that. Another time,
the same girl friend with me were
in her dad's car. She pulled to
far out into the winter section.
So she decided to back up. Well
the back window was fogged up.
we swarmed right into a car.
We were scared cause two guys
got out. Well it was Larry and
another of his friends. They started
laughing and told us to not
worry.

and the pioneer way of life, which I have always felt a strong kinship with. As to papers we were always, at each other's homes to hang up, eat dinner and listen to music. At one point, Garry owned New England Trapper Supply. He showed me what he used to make lures and what animals they attracted. He also wrote several books on the subject. They are quite good. Garry is smart and articulate. I am not. He never judged me. He saw that I had an intense desire toward nature and the old ways. We clicked. I was never, and still am not afraid of Garry. Being the only girl with Garry Brothers, my parents were strict. Trust me. They were not afraid of Garry, or afraid to let me go later with him. Even with shot guns to the quarry.

4/28/97

Dear Ms. Goody,

My name is Marine Julie Baldygo. I am writing to you as a friend of Gerry Barcella. I have known Gerry since childhood. We spent a lot of years together as close friends. I have four brothers and my Dad was an instructor for N. Indian Guides. It is a club like the Boy Scouts. It taught kids about nature. We tanned hides, looked for arrowheads, etc. My dad is a wonderful beater carrier and very artistic. He shared that with his group. Gerry is the age of my older brother, Paul. Although they got along fine, Gerry and I had more of the same naturalistic instincts, were Paul is more into computers and such. I would go to the quarry's with Gerry and he taught me to shoot. He taught me about the old black powder guns,

witness J. M. [unclear]
Notary Public Joyce A. Hoffmann

signature Trenner W. Tompkins III

SS: Lebanon November 4, 1997

New London County, Connecticut my Commission Expires 7/31/2002
11-4-97

RE: GERRY BARCELLA

TO WHO IT MAY CONCERN,

I TRENNER W. TOMPKINS III OF 113 KINGSLEY RD. LEBANON CT 06249 AM WRITING A CHARECTOR LETTER ON BEHALF OF GERALD BARCELLA.

I HAVE KNOWN GERRY SINCE 1974 AND HE HAS ALWAYS BEEN A LOYAL AND TRUSTED FRIEND TO ME AND MY FAMILY.

I KNOW THAT HE IS NOT CAPABLE OF SUCH A TERRIBLE CRIME FOR HE IS A DEVOTED CATHOLIC AND BELIEVES IN GOD

I HAVE WORKED WITH HIM FOR MANY YEARS IN THE CONSTRUCTION TRADE AND NEVER HAD ANY PROBLEMS WITH HIM. HE ALSO CAME TO MY AID WHEN I BROKE MY BACK AND VISITED ME IN THE HOSPITAL BRINGING ME BOOKS AND MAGAZINES TO READ.

I FEEL THAT HE IS INNOCENT OF SAID CHARGES AND ~~SHOULD~~ SHOULD BE SET FREE. RESPECTFULLY

Trenner W. Tompkins III
113 KINGSLEY RD
LEBANON CT 06249
273

Richard A. Ceruti
74 Birch Lane
Kensington, CT 06037

September 6, 1997

Mary C. Goody
Mitigation Specialist
P.O. Box 508
155 E. Pearl; Lower Level
Jackson Hole, WY 83001-0508

Mary,

I have known Gerry for 22 years. He is a loyal friend to me. Gerry has also grown to be very close to the rest of my family. I chose him to be my best man at my wedding because he is my friend and an honorable person.

Gerry has always treated my family with respect and courtesy. He has always shown respect for his elders, especially my father, mother and grandparents. I have witnessed his compassion for animals and persons with learning disabilities. In high school, he was selected to work with people with learning disabilities, helping them adjust to life in the working world. He displayed kindness and concern for their well being. He also cared for homeless animals in the local animal shelter. I have personally witnessed his compassionate care of helpless animals in the shelter.

I also know that he had an alcohol problem at one time, as does 10% of the adult population of the U.S. Because of his struggle, he was involved in treatment through AA and progressed to the stage of mentor to persons new to the program, serving as a counselor, helping people with their personal burdens.

I believe he is a productive member of society, and he has the ability to show others personal strength and the courage of their convictions. I also believe he has strength of character and would be surprised if he were involved in an act of violence unless he were defending himself.

I hope Gerry is in good health. Please give him my regards.

Sincerely,



Richard A. Ceruti

P93

I know for me and a host
of others Gerry played a
Big part in achieving our
Sobriety He was always there
Gerry loved people and would
give you all the support you
needed. I have met Gerry
family they are good people
with Big Hearts I guess
that's where he gets it from

Well then I Belie^{ve} in the
Early part of 1994 Gerry moved
to Idaho WE wrote back &
Forth for awhile But lost
touch with one another, I
Hope this letter may be
Beneficial in describing the
Gerry I knew.

Your truly
Steve Lube

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Really didn't see much
of Berry in the next
couple of years too
follow until I sought
help for a alcohol problem
thru Alcoholics Anonymous
and found out that Berry was
a very active member for
sometime and sponsor
A lot of the new comers
And he was willing to help
me. We attended lots of
meeting together Berry had
a very strong desire to do
all he could for the fellow
ship of AA and to help
anyone who needed him
He showed me the truly
care's for the welfare of
other's inside the rooms
of AA and outside

To Whom it may Concern
I'm Writing this Letter on
Behalf of Gerry Barcella.
➤ I first met Gerry in the
Early 1980's When I Went to
Work Temporality for a Longtime
friend Gerry was also Employed
As a Painter. I worked Along
Side Gerry for Several Months.
I thought Gerry to Be quite
friendly a very like able guy
with a great personality.
Whom Worked Hard and
displayed good Work Habits
took Pride in his Work and
himself and was a pleasure
to work with. In the
fall of that year I return
to work for my former
Employer and I

WE WORKED ON MANY ELDERLY
PEOPLES HOMES AND GERRY ALWAYS
GOT ALONG WELL WITH THEM.

AS WE BECAME BETTER FRIENDS
GERRY CAME TO KNOW MY FAMILY
MY WIFE DEBBY, AND MY SONS
FRANK AND CHRIS. MY BOYS
ARE NOW 33 AND 32 YEARS OLD

MY FAMILY IS INTO CAMPING
AND GERRY HAS GONE WITH US
MANY TIMES.

I KNOW OF GERRY'S PROBLEMS
WITH THE LAW OVER THE YEARS.

I GO BY HOW HE HAS TREATED
AND ACTED TOWARDS ME MY
FAMILY AND HIS MANY FRIENDS

HE IS WELCOME AT MY HOME
ANYTIME I LIVE IN FT. MYERS
FLA. NOW WITH MY WIFE AND
MY SON FRANK. AFTER HIS
PRESENT PROBLEMS ARE DONE
I HOPE HE CAN COME TO FLORIDA
AND STAY WITH US FOR A WHILE

Frank J. Mori
8130 MATANZAS RD.
FT. MYERS. FL
33617

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TO WHOM IT MAY CONCERN.

I HAVE KNOWN GERRY BARCELLA FOR ABOUT 20 YRS. WE MET WHILE WORKING FOR THE SAME COMPANY IN CT.

ONE DAY AFTER WORK GERRY NEEDED A RIDE HOME. SO I DROVE HIM HOME. I MET HIS MOM, DAD, BROTHER, SISTER, AND THEIR DOG MARIE. GERRY'S MOM TOLD ME HOW WHEN THEY FIRST GOT THE DOG SHE COULD NOT BARK. SO GERRY TAUGHT HER HOW.

HIS FAMILY IS IN THE TRAPPING SUPPLY BUSINESS. GERRY WAS VERY INTO THAT. HE HAS A SCRAP BOOK WITH MANY PICTURES OF HIM AND HIS DAD FISHING AND TRAPPING.

GERRY AND I SOON BECAME GOOD FRIENDS. SOMETIMES HE WOULD WORK FOR ME WHEN HE WAS BETWEEN JOBS. I FOUND HIM TO BE TRUSTWORTHY AND A GOOD WORKER.

their backs and the door, and they stepped it. I'm still not sure how they knew but they just seemed to pick the right people to parlay with and worked the room until the tempers where lessened and nobody was threatened. The whole situation was a powder keg and it very easily could have gone up.

If I really wracked my brain I'm sure that I could come up with more long forgotten memories. As I've been contemplating this letter, and actually writing it, old ghosts just keep popping up and just serve remind me how often I think about Gerry and how much I really do miss him.

If you need any more information, please contact me, I would be honored to help Gerry anyway possible. He has, if you can't tell, a special place in my heart. I'm also quite willing to speak on him behalf, in person.

Please find enclosed, my business card. If you want to contact me, feel free during office hours as well. Please tell Gerry of this letter and that I'll be writing him soon, too. Send him my love. My thanks and appreciation for what you are doing.

Sincerely,



Rebecca Wicander
1199 Whitney Ave
Apt. 419
Hamden CT 06517-2808
(203)865-1433

Enclosure

thought he had said was that "we" were getting an apartment together. Needless to say things were quite different than I had expected them to be and our home life was worse than what it was when we were living @30 miles apart. I didn't know anyone, had no car, no phone and basically no money. One night (I'm not proud of this), I had had way too much to drink, drowning my troubles and was suicidal. I don't know how or why I remembered Gerry's phone number, but I did. I called from the pay phone at the store. I know he wasn't thrilled to hear from me, in the state that I was in, the fact that I was his "bud's" ol' lady, etc., but he said that he would come. I went back to the apartment and waited. Waiting for Gerry became a "life saver" in the ocean. All I had to do was just hang on. It took a while, but he did show up. He listened to me cry, conned me into laughing, made me get out of the house for a while, took me to a get together of his friends who I didn't know, and later he took me for a ride into the woods, knowing that that too would calm me down. I know it sounds a little strange, but, in short, Gerry was Love Personified that night. *I don't know that I could write this letter today, with out Gerry that night.*

I know that Gerry has a reputation of "going off", loosing his temper. I have never seen this. He has been to my house many, many times and been nothing be a gentleman. The closest I ever saw him to being truly upset happened in 1991. My husband had been working with Gerry on a job (carpentry) and had left his tool belt at Gerry's house. I volunteered to go get it. It was in the evening and when I got to the house, I found both Mr. Barcella and Gerry out in the garage. Gerry was working on his motorcycle and it was giving him a hard time starting. He was getting frustrated and a little worked up. I remember thinking that if he wasn't so bound-and-determined to get it started right then, then it wouldn't upset him so much. I got his attention, got the tool belt and got him to get into the car, in search of a beer. We never got the beer, but just ended up riding around for @15 minutes. He was ready to go back to the house and continue working on the bike. I believe he had it running the next day, but I'm not positive.

As a general list of good things that he's done, that I know about, I offer the following:

I know that he has always tried to address the problems that he may have, including help by AA, NA and also professional mental health people.

I know that he's gone as far as letting a transient woman stay with him, as an alternative to her spending time as a ward of the local police. He took good care of her, too. Her name was Cheryl and she needed a friend. I remember Gerry asking to borrow some clothes from me for her, so that she would be clean.

He's done talks with school kids, the just say no kind and tried to impress on them the virtues of staying in school and keeping things above-board.

I've also seen him stop what surely would have been a serious bar fight with many injuries, on his wits and brass. A new group was at this little neighborhood bar (used to be called Anthony's) and they were starting trouble with a few of the more regular patrons. These new guys were egging them on and goading and making it quite clear that the bar was now "theirs". Dave, Gerry and I were sitting at the bar and saw that there was going to be trouble. Instead of backing away, so that he couldn't/wouldn't get in trouble, Gerry and Dave assessed the situation, had me watch

August 5, 1997

Ms. Mary C. Goody
PO Box 508
155 E. Pearl
Jackson Hole WY 83001

Dear Ms. Goody:

I am writing in response to your request for a character reference for Gerry Barcella. I assume that for a character reference to hold any credence that the character giving it must be credible. In short, here is "who" I am.

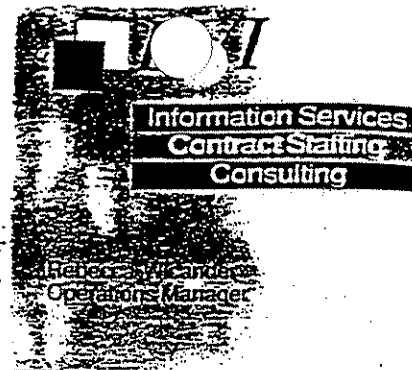
My name is Rebecca Lee Wicander, nee Gilbertson. I'm 32 and I've been married to my son's father for three years, this October 1, and our son (an only) is 8 1/2 years old. I am Operations Manager for a smaller North Haven, CT based firm known as PVI Enterprises, Inc. Our main focus is on placing computer professional, on a contract or permanent basis, with companies in need of their abilities in CT, MA, NY and NJ. I've been with PVI since 1995.

I have a continuous work history/education history since I was 14 years old (with some time off for documented injuries and the birth of my son). And other than a driving under suspension charge- in 1986- which was "bogus" and was nolieed, I have no record.

I've known Gerry, through my husband, David W. Wicander, since summer of 1986. I don't remember the instances around our first meeting, but what does stick with me is an instant and genuine liking for him and a feeling of trust. I knew that with Gerry around, I didn't need to worry about anything.

When I was younger, I wasn't an angle, and I did get into a few situations that would cause me problems. I did the bar thing and the like and Gerry always took care. At one point I felt that I needed to stop drinking and get myself back on an even keel. Gerry would see me with a drink in my hand, and "check it out". All the times this happened, he always found soda, and I always appreciated his concern. He knew that was what I needed to do, what I said I was going to do, and he was going to help me. I still feel that if he hadn't found soda, I would have been in for some serious counseling on the subject. I couldn't give you any clear dates about these instances but I would say it was between 1986-1990.

One situation that will always stand out, to the end of my days, is that Gerry gave me my life back. It was summer of 1986. (My time line is not as accurate as I would like, back then dates were just things that happened and were rarely noted by me.) Dave and I had just gotten an apartment in New Britain, 35 Elam Drive. I had been living in Burlington and Dave in Kensington. I needed to move, so unbeknownst to me, Dave was just offering to help. What I



PVI Enterprises, Inc.
PVI Information Services
110 Washington Avenue
North Haven, CT 06473
Phone: (203) 234-2405
 (866) 734-1473
Fax: (203) 234-9398
www.PVI-FirstCall.com

31. Guy Grabowski
32. Alison Carlson, R.N.
33. Greg Carlquist
34. David A. Carbo
35. Brian A. Ceruti
36. Lance A. Ceruti
37. Keith Czarniecki
38. Mark P. Egri
39. Michael Fields
40. John M. Fitzsimmons, O.D.
41. Frank Gadomski
42. Lois A. Grey
43. Frank Green
44. B.J. and Smokey Kiser
45. Keith Knecht
46. Joseph M. LaFlamme
47. Johanne M. Noury
48. Christian Noury
49. Debra J. Nowak
50. Julie Reiskin, LCSW
51. David G. Skwiot
52. Karl Skwiot
53. Edward Skwiot
54. Noel Skwiot
55. Brian P. Tully
56. William W. Wiley
57. John P. Kraft
58. George W. Meligonis

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MARY C. GOODY
MITIGATION SPECIALIST

P.O. Box 508
155 E. Pearl
Jackson, Wy. 83001
(307)734-1854 • Fax (307)733-2774

Notebook Index
Letters of Reference on Behalf of Gerald Angelo Barcella

1. Holly Ceruti
2. Richard A. Ceruti
3. Peter Coyle
4. Peter A. Day
5. Steve Dube
6. Andrea A. Forgione
7. Paul Hackett
8. Gloria McCarthy
9. Michael P. McCarthy
10. J.R. MacMaster
11. Gregg McKenzie
12. Frank J. Morin
13. Debra D. Morin
14. Charles H. Munson
15. Peter Pekrul
16. Anthony Riccio, Jr.
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18. Dick Slather
19. Trenner W. Tompkins 111
- 20. Bernard Walsh
21. Rebecca Wicander
22. David W. Wicander
23. Kathleen T. Grey
24. Stanley Archacki
25. Maxine Baldyga
26. Robert Bowker
27. Kevin C. Grib
28. Jeffrey A. Baldyga
29. Alane Boria
30. Dick Caron

I.A.C. Trial Counsel

Mr Barcella wished to present to jurors the 58 Character reference letters used in his Presentence Report at trial. Mr Barcella's request was denied despite the overwhelmingly positive nature of the letters. A great portion of the letters state the authors' disbelief that Mr Barcella could commit the crime of murder and could have helped the jurors render a "not guilty" verdict or a much lesser conviction for manslaughter.

See 57 Character letters in this petition

Note - the letters are arranged with the people who were supposed to testify at Barcella's trial first.

IAC Trial Counsel

and investigator Gabe Caballero would have shown that jailhouse snitch Robert Agrifoglio had access to trial discovery from Bill Smith's death in Barcella's cell before Barcella was charged in Smith's death
T.p. 1586, 220-24 and T.p. 1587, 210-17

Robert Agrifoglio also had access to legal work on a lawsuit Barcella was preparing to file on Shoshone City for the death of one of his puppies several months before Bill Smith's acquaintance with Barcella. Agrifoglio used that lawsuit as basis for alleged motive Barcella had that Smith killed his puppy T.p. 1367 21-7

Atty Iniguez and Investigator Caballero would have testified they had gotten along well with Barcella and he was not the rabid racist portrayed by the State. Both are of hispanic descent.

Mr Barcella wrote his attorney several times concerning procuring witness testimony.
Kootenai City jail files #6 (07-02-95),
#8 (07-02-95), #9 (07-06-97), #11 (07-13-95)
#13 (07-19-97) #29 (08-19-97), #30 (08-19-97)
#34 (09-01-97)

Ineffective Assistance of Counsel Atty John Adams

Although Attorney Ruben Iniguez and Investigator Gabe Caballero of the Eastern Washington and Idaho Federal Defenders Office were scheduled to testify at Mr Barcella's trial upon arrival they were turned away by Atty Adams despite pleas by Mr Barcella that they be allowed to testify as planned.

Mr Barcella was represented by Atty Iniguez and Investigator Caballero in 1995 for a federal firearms violation
T.p. 832 L.6-25.

Rikki Bobo gave these men the "note from Bill", Defendants exhibit A, T.p 803, L23-
p.804, L1-2 and told them Barcella never told her he killed Bill Smith.

Both Atty Ruben Iniguez and Gabe Caballero gave sworn affidavits to Atty Adams concerning Bobos statements to them and concerning the note from Bill and that the Federal Defenders Office had received discovery from the Bill Smith case and forwarded it to Mr Barcella at the Latah Cty Jail.
in April of 1995

The testimony of Atty Ruben Iniguez

I.A.C. Trial Counsel

Mr. Barcella wished to present testimony of "Troy" an acquaintance of Barcella and/or Carroll, owner of Lake City Saloon that Barcella was attacked by several members of the Gypsy Tokers motorcycle gang and member or affiliate "Birdie" put a pool cue to the eye of a prostrated Mr. Barcella and said he would kill Barcella the next time he saw him. Birdie is approx. 5'4" tall and an alleged enforcer/hitman.

Both Troy and Carroll witnessed this act and Barcella contends if he did threaten anyone or threaten "that little fucker" as ascertained by Wyline Smeltzer in testimony it was in regards to "Birdie."

Counsel for Barcella failed to act.

See Kootenai Cty jail notes #6 (07-02-97),
#9 (07-06-97), #11 (17-13-97), #29 (08-19-97),
#30 (08-19-97), #33 (09-01-97), #34 (09-01-97)

I.A.C. Trial Counsel

Mr. Barcella wanted his attorneys to interview and present the Bartender (owner's daughter - maybe "Wendy") from the Laker's Cafe who witnessed Mr. Barcella knock unconscious "Ronnie", the homosexual lover of Brad Bakie approximately 4 days before Bill Smith's death, after Ronnie sexually assaulted Barcella and tried to force Barcella to dance with him.

Bakie is a biased witness being Ronnie's lover, a close friend of Ken Thrift (a main witness and suspect in Bill Smith's death) and a flagrant homosexual.

Barcella was not able to confront Bakie to his biasedness by counsel's ineffective assistance.

The exposure of witness motivation in testifying is a proper and important function of the constitutionally protected right of cross examination. The partiality of a witness is subject to exploration at trial.

Barcella requested several times in 1997 by U.S. mail and Kootenai Cty. kites to interview and subpoena certain people including this person Kootenai Cty. jail kites #3(06-27-97) #6(07-02-97) #9(07-06-97) #11(07-13-97) #29(08-19-97) #30(08-19-97) #33(09-01-97) #34(09-01-97)

after repeated requests for quiet at 2:00 am when Bahie was molesting Ken Thrift in the adjoining room, and Barcellos sign on his door was referring to Bahie and "Ronnie". Bahie is a flagrant "Queen" (homosexual). Atty Adams froze and posed no impeaching evidence against Bahie as was planned and discussed and agreed upon by Barcellos and his attorneys.

Counsel for Barcellos ignored the damning evidence against Bahie and left his testimony unscathed.

I.A.C. Trial Counsel

Trial counsels lack of requested, proper, and thorough cross-examination of Brad Bakie failed to present viable defense evidence and present a significant adversarial challenge to the testimony of Brad Bakie.

The exposure of witness motivation is a proper and important function of the constitutionally protected right of cross-examination.

Bakie's partiality should have been thoroughly presented to the jury.

During Counsel's questioning of Bakie concerning Bakie's homosexuality, prosecutor objected on grounds such questioning was rude. The judge granted the objection. Bakie denied he was homosexual. T.p. 939, 19-20

Atty Adams was flustered by prosecutor's and Judge's loud condemnation of questioning and did not ask to remove witness outside of jurors presence to lay foundation to intended cross-examination as to Bakie's being a biased witness against Barcella as Barcella demeaned Bakie about being homosexual, knocked Bakie's homosexual lover unconscious the week of Bill Smith's death after he (Ronnie) tried to force Barcella to dance with him. Barcella allegedly fired a 191

Barcella contends Thrift, Smeltzer and others lied on the stand at Barcella's trial and were biased witnesses.

The district court noted Barcella's conviction depended upon witness credibility.

T.p. 1432, 418 - p. 1433, 41-3 There were no eyewitnesses to the crime nor was there any physical evidence.

At prelim hearing the judge talked about witness credibility issues and inconsistent testimony prelim p. 481, 45-9

I.A.C. Trial Counsel

Failure To Call George Christman

Mr. Barcella claims his 5th, 6th, 8th and

14th Amendment rights and Idaho Constitutional

rights to due process, right to confront witnesses,

access to courts, effective Assistance of counsel

and right to be free from cruel and unusual

punishment gotten by an unfair process were violated

when trial counsel failed to call George

Christman to help provide a significant

adversarial challenge to testimony of Kenneth

Wayne Thirt, Christman is a disinterested party.

George Christman told Police he'd repeatedly

seen Ken Thirt at Bill Smith's door - arguing

loudly with Bill T.P. 343, 417 - p 349, 41-22

This would also discredit false testimony

by Virginia Wayne Smiths that Bill Smith

was scared of Barcella T.P. 484, 412 - p 496, 41-3

Christman also told Police he'd seen Thirt

in the hallway outside Smith's door on

04-03-01 in the early am. While Barcella was

in room with alibi witness Bill

Soiberg T.P. 450, 413-21

Thirt was one of a main witnesses against

Barcella T.P. 413, 415-24

Thirt repeatedly lied and perjured himself

at Barcella's prelim hearing and trial

see False and Perjured Testimony of Ken Thirt

F.A.C. Trial Counsel.

cell from Bill Smith's death and often noon would be around to monitor Agripino's movements and he had access to Barcella's legal work.

Atty Adams feeble excuse to not allow Fanning to testify was that Fanning was mentally ill; despite the fact Fanning was on medication and had no episodes of his illness at the time of Barcella's trial or while questioned by Barcella's investigators.

would confess a crime to him and that Barcella had run Agrifoglio out of the cellblock they were in and Barcella routinely harassed Agrifoglio about being a snitch and nicknamed Agrifoglio "Pinnocchio". Agrifoglio was braced against Barcella and lost a civil case in Latah County just before fabricating Barcella's alleged confession. Agrifoglio tried a new factive once he blew his chance for postconviction relief through ignorance and by representing himself at his postconviction relief evidentiary hearing.

Mr Fanning could have corroborated the fact Agrifoglio had access to Coeur d'Alene area newspapers, Latah City newspapers, Television news programs, and could hear all telephone conversations in the small cellblock of approx 6 cells and small dayroom. Mr Fanning could have testified only two inmates at a time were allowed in the rec area contradicting Agrifoglio's testimony. Fanning was present when Barcella allegedly confessed.

Fanning could have testified to the fact 19! cell doors were open from 6:00 am - 12:00 midnight, that Barcella had discovery in her

Ineffective Assistance of Counsel

Atty John Adams

Gerald Barcella wished to present and confront witness Clyde Fanning at trial.

Fanning was brought to Kootenai City from FCI Sheridan, OR. Fanning was housed with

Barcella and Agrifolio in Latah County jail.

Fanning would have testified that he never heard Mr Barcella confess Bill Smith's

murder to anyone including Robert Agrifolio and that Barcella would not do so.

Barcella contends having the jury hear this from Fanning would help impeach Agrifolio's testimony.

Fanning is also a Coeur d'Alene Indian and was a friend of Barcella's. This

would discredit the prosecution's accusation

Barcella was rabidly racist.

Fanning could have testified Barcella was preparing a lawsuit against Shoshone City while incarcerated in the Latah City jail and that is how

Agrifolio came up with the story Barcella killed Smith because he thought Smith killed his puppy.

Barcella gave all legal work he had in Latah City jail to Atty Adams.

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Mr Fanning would have testified Barcella, Fanning and fellow inmate Bryan Ames all thought Agrifolio was a snitch and no one

phone conversations between Barcella and his attorneys in the tiny day room.

Bryon Ames is of American Indian decent and formed a friendship with Barcella discrediting the prosecution's claim Barcella was so viciously racially prejudiced he killed BITI Smith over a racist sign on his (Barcella's) door.

Ames had no impeachable felony convictions I.p. 1593, L.S.-14 Yet despite Barcella's requests Ames be allowed to testify counsel ignored Barcella's requests.

F.A.C. Trial Counsel

Trial counsel failed to present and confront witness Byron Ames at trial despite the fact Ames was subpoenaed and brought to Keosauqua City, ID from Arizona.

Byron Ames was held in the same cellblock at Latah City jail with Mr Barcella, Robert Agrifoglio and Clyde Fanning between April 1995 and September 1995.

Mr Ames would have testified he never heard Barcella admit to Bill Smith's killing, that Barcella thought Agrifoglio was a jailhouse snitch, disliked and taunted Agrifoglio, nicknamed Agrifoglio "Pinnocchio" and eventually ran Agrifoglio out of the cellblock they were in and that Agrifoglio was mysteriously put in the cellblock they occupied for no apparent reason and Barcella, Ames and Fanning were all Federal prisoners, Agrifoglio was a state prisoner and Barcella allegedly was planted to snitch on Barcella by Dep. Phil Gray - a friend of Agrifoglio's.

Ames could have testified that Agrifoglio had access to discovery from Bill Smith's 198 death Barcella had in his cell, newspapers, television news programs and could hear all

IAC Trial Counsel

reinforced Barcella's contention Bill Smith did not in fact kill Mr Barcella's dog nor did Bill Smith in any way force Mr Barcella to get rid of his dog.

At trial Atty Adams said he regretted not supplanting the two people. Prosecutors lied to jurors Bill Smith forced Barcella to get rid of his dog. Barcella told the two the reasons stated in paragraph 5 of the preceding page why he was giving his dog away. Barcella was also considering having Rikki Bobo move in with him and was told he could have the dog or Bobo, not both. Barcella should keep the dog.

I.A.C. Trial Counsel

Despite pleas by Mr Barcella his attorneys refused to subpoena the two people (husband and wife) Barcella gave his dog Jake to in early March, 1995.

Mr Barcella gave his attorney the young couple's address and phone # which were 103 South Park, Post Falls, ID
(208) 773-9732

Mr Barcella wanted to present this viable defense theory to contradict testimony of Robert Agriholio that Mr Barcella killed Bill Smith because he (Barcella) thought Smith killed his dog.
T.p. 806, 41-13

Kootenai Cty. jail kite #9 (07-06-97)

" " #11 (07-13-97)

Agriholio was a jailhouse who would perjure himself to his benefit.

Barcella gave away his dog Jake due the urban environment of Coeur d'Alene, Mr Barcella's living arrangements and financial status.

Bill Smith gave Barcella permission to have his dog at 205 Indiana and did not force Barcella to get rid of the dog.

The two people's testimony would have

They walked to 205 Indiana and proceeded to drink.

Despite Police reports putting Thrift at 205 Indiana at 8:30 pm and then in his room passed out drunk

J.p. 1531, L17 - p. 1533, L1-15 Atty Adams refused to believe Barcella.

At trial Brad Bakie testified he left the Watering Hole Bar with Thrift T.p. 945, L1-8

Atty Adams was dumbfounded. Barcella had told Atty Adams the truth and Adams blew Barcella's Alibi.

Barcella contends the results of the trial would have been much different and Barcella was severely prejudiced.

Solberg would have confirmed George Christman's allegations Thrift often loudly argued with Bill Smith

T.p. 343, L17-p. 349, L1-27

Solberg told police he went to sleep in Thrift's room at approx 3:15 am on 04-03-95.

Thrift lied to police and jurors Solberg was not there T.p. 604, L4-p 605, L1-2

Solberg and Barcella were the only two of the alleged group at the Watering Hole Bar when they left

T.p. 945, L1-p 946, L1-8

and were not thrown out as prosecutors lied to jurors in opening statements. T.p. 262, L6-9

Solberg told police Barcella had no duffel bag containing a saved-off shotgun and hatchet as prosecutors lied to jurors

T.p. 262, Ls. 10, 11

Barcella defense attorney John Adams told Barcella he was lying when he (Barcella) told Adams he was with Solberg in Rathdrum when Thrift said he left the bar with Barcella, 202

to Bill Smith, yet never went to police

One of the main witnesses against Barcella was Kenneth Wayne Thrift who lied to jurors he walked home from the watering Hole Bar with Barcella at 1:00 am T.p. 561, p 566, 41-8 and saw Barcella wiping off the door knob to Smith's room T.p. 571, 42-p 572, 41-13

Norman Bennett told police he heard Ken Thrift in the hallway at 1:00 am Bennett told Thrift this T.p. 897, 421-p 898, 41-6 and someone tripped over the plant. Thrift told jurors Barcella tripped over a plant in the hallway T.p. 565, 44-6

This strangely matched the police interviews of Bill Solberg T.p. 471, 49-19

Thrift was a main suspect if not the main suspect in Smith's death till Rikki Bobo implicated Barcella. T.p. 413, 415-24

Brad Bakie was a close friend of Ken Thrift and a flagrant homosexual who strongly disliked Barcella. Solberg would have testified to this and that he never heard Barcella threaten Smith as he told police.

IAC Trial Counsel

The district Court noted Barcella's conviction depended upon the credibility of the witnesses T.p. 1432 L19-p 1433, L1-3 There were no eyewitnesses to the crime nor was there any physical evidence.

At the prelim hearing the judge talked about credibility issues of the witnesses and inconsistent testimony prelim p. 481 L5-9

Bill Solberg told police in two interviews (on 04-06-95 and on 09-06-95) he was drinking with Barcella at the Watering Hole Bar in Coeur d'Alene ^{on 04-02-95} and at approx 11:30pm they drove to the Shady Rest Bar in Rathdrum where they drank, then drove home to 205 Indiana, arriving at approx. 3:00 am - 3:15 am on 04-03-95. T.p. 471, L9-22, and T.p. 462, - 464

Solberg also told police Barcella never threatened Bill Smith that night and Barcella didn't have a duffel bag with him, contesting the false testimony of biased witness Virginia Wyden Smeltzer ²⁰⁴ who police had to go to 18 months after Bill Smith's death and on a tip from Rikki Bobo. Smeltzer said she was very close

I.A.C. Trial Counsel

Trial Counsel failed to call ALIBI
WITNESS Witness Bill Solberg.

Had Trial Counsel not failed to interview and call alibi witness Bill Solberg, a disinterested party, there is reasonable probability the outcome of the trial would have been different.

Mr Barcella's defense attorneys failed to present a viable defense and present a significant adversarial challenge to the State's biased witnesses who repeatedly proffered false and perjured testimony as shown in the transcripts. Some of the false statements could not be adequately contested by Barcella's attorneys without Solberg's testimony.

Barcella repeatedly demanded Bill Solberg testify only to be refused by Attorney Adams. In 1997 Solberg was working in Winnemucca, Nevada and his wife and son resided in Coeur d'Alene.

Solberg's testimony would have totally discredited testimony of Ken Thrift and seriously contested much of Brad Bakery's and Virginia Wyline Smeltzer's testimony.

theory Ken Thrift killed Bill Smith
prelim 72, 219 - p 73, 21-11

I.A.C. Trial Counsel

Bill Solberg told police on 04-06-95 and 09-06-95 he never heard Barcella threaten Bill Smith on 04-02-95 or 04-03-95. See police interviews of Bill Solberg.

Barcella wanted to present evidence he had seen and heard Thrift in several arguments with Bill Smith and Thrift told Barcella Bill Smith was deathly afraid of Ken Thrift and Bill Smith told Barcella he was moving out due to Thrift's behavior. See Affidavit of Gerald Barcella

Thrift was suspect in Bill Smith's death Ip. 413, 45-24 and police wanted Barcella to finger Thrift for Smith's death, stating upon Barcella's refusal that he (Barcella) would end up doing 30 years for Bill Smith's death.

The lies, prejudices or motive of a witness to lie ~~is~~ concerning issues presented at trial is always an issue.

George Christman told police Ken Thrift was often at Bill Smith's door arguing loudly with Smith Ip. 343, 217 - p. 349 21-22. George Christman also told police he had seen Thrift in the hallway in early hours of 04-03-95.

Police never followed up on Christman's

IAC Trial Counsel

him at approximately 10:00 P.M. on 04-02-95 to report putting Ken Thrift in his room after finding Thrift passed out in the Hallway. T.p. 1531 L17-p. 1532, L1-5

Norman Bennett testified he heard Ken Thrift in the hallway at 1:00 a.m.

Police Interview of Norman Bennett
04-06-01

Bill Solberg told police he and Barcella left the Watering Hole Bar at approx. 11:00pm on 04-02-95 and drove to the Shady Rest Bar in Rathdrum and then returned to 205 Indiana at approx 3:15 am on 04-03-01 T.p. 450 L13-21

Solberg was staying in Thrift's apartment T.p. 488, L6-10 and that Thrift was in the apartment upon arrival. See police interview Bill Solberg

Thrift's testimony that Barcella tripped over a plant in the hallway T.p. 565, L1-18

Strangely matches Bill Solberg's testimony Barcella tripped over the plant T.p. 450 L13-21. Norman Bennett told Thrift he heard him in the hallway and he heard someone knock over the plant

T.p. 414, L20-p 416, L1-17 and T.p. 897, L21-p 898 L1-6

I.A.C. Trial Counsel

Trial Counsel failed to present the viable defense theory that biased state's witness Kenneth Wayne Thrift had motive and opportunity to kill Bill Smith

Barcella's requests that defense attorneys present this viable defense and in turn present a significant adversarial challenge to prosecutors went unheeded.

Atty Adams told Barcella he was lying when he (Barcella) told Atty Adams he did not leave the Watering Hole Bar with Ken Thrift but was in fact with Bill Solberg. Upon hearing testimony of Brad Bakey Atty Adams was dismayed to hear from Brad Bakey that Ken Thrift left the Watering Hole Bar with him contesting Thrift's testimony

T.p. 945, 217 - p 946, 217

Ken Thrift lied to the jury he left the Watering Hole Bar with Barcella at approx 2:00 a.m. and walked to 205 Indiana

T.p. 561 - p 566, 218

Police reports indicate Thrift was drunk and causing trouble at 205 Indiana at 9:30 P.M. on 04-02-95 TP 1553, 22-9

Peter Cooper testified Bill Smith telephoned

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for a client. If a lawyer's employment is limited to a specific matter, the relationship terminates when the matter has been resolved. If a lawyer has served a client over a substantial period in a variety of matters, the client sometimes may assume that the lawyer will continue to serve on a continuing basis unless the lawyer gives notice of withdrawal. Doubt about whether a client-lawyer relationship still exists should be clarified by the lawyer, preferably in writing, so that the client will not mistakenly suppose the lawyer is looking after the client's affairs when the lawyer has ceased to do so. For example, if a lawyer has handled a judicial or administrative proceeding that produced a result adverse to the client but has not been specifically instructed concerning pursuit of an appeal, the lawyer should advise the client of the possibility of appeal before relinquishing responsibility for the matter.

Rule 1.4 - Communication

- (a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.
- (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

COMMENT:

The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so. For example, a lawyer negotiating on behalf of a client should provide the client with facts relevant to the matter, inform the client of communications from another party and take over reasonable steps that permit the client to make a decision regarding a serious offer from another party. A lawyer who receives from opposing counsel an offer of settlement in a civil controversy of a proffered plea bargain in a criminal case should promptly inform the client of its substance unless prior discussions with the client have left it clear that the proposal will be unacceptable. See Rule 1.2(a). Even when a client delegates authority to the lawyer, the client should be kept advised of the status of the matter.

Adequacy of communication depends in part on the kind of advice or assistance involved. For example, in negotiations where there is time to explain a proposal, the lawyer should review all important provisions with the client before proceeding to an agreement. In litigation a lawyer should explain the general strategy and prospects of success and ordinarily should consult the client on tactics that might injure or coerce others. On the other hand, a lawyer ordinarily cannot be expected to describe trial or negotiation strategy in detail. The guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interests, and the client's overall requirements as to the character of representation.

Ordinarily, the information to be provided is that appropriate for a client who is a comprehending and responsible adult. However, fully informing the client according to this standard may be impracticable, for example, where the client is a child or suffers from mental disability. See Rule 1.14. When the client is an organization or group, it is often impossible to inform every one of its members about its legal affairs; ordinarily, the lawyer should address communications to the appropriate officials of the

organization. See Rule 1.13. Where many routine matters are involved, a system of limited or occasional reporting may be arranged with the client. Practical exigency may also require a lawyer to act for a client without prior consultation.

Withholding Information

In some circumstances, a lawyer may be justified in delaying transmission of information when the client would be likely to react imprudently to an immediate communication. Thus, a lawyer might withhold a psychiatric diagnosis of a client when the examining psychiatrist indicates that disclosure would harm the client. A lawyer may not withhold information to serve the lawyer's own interest or convenience. Rules or court orders governing litigation may provide that information supplied to a lawyer may not be disclosed to the client. Rule 3.4(c) directs compliance with such rules or orders.

Rule 1.5 - Fees

- (a) A lawyer's fee shall be reasonable. The factors to be considered in determining the reasonableness of a fee include the following:
 - (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
 - (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
 - (3) the fee customarily charged in the locality for similar legal services;
 - (4) the amount involved and the result obtained;
 - (5) the time limitations imposed by the client or by the circumstances;
 - (6) the nature and length of the professional relationship with the client;
 - (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
 - (8) whether the fee is fixed or contingent.
- (b) When the lawyer has not regularly represented the client, the basis or rate of the fee shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation.
- (c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. A contingent fee agreement shall be in writing and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal, litigation and other expenses to be deducted from the recovery, and whether such

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client to make a good faith effort to determine the validity, scope, meaning or application of the law.

- (e) When a lawyer knows that a client expects assistance not permitted by the rules of professional conduct or other law, the lawyer shall consult with the client regarding the relevant limitations on the lawyer's conduct.

COMMENT:

Scope of Representation

Both lawyer and client have authority and responsibility in the objectives and means of representation. The client has ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations. Within those limits, a client also has a right to consult with the lawyer about the means to be used in pursuing those objectives. At the same time, a lawyer is not required to pursue objectives or employ means simply because a client may wish that a lawyer do so. A clear distinction between objectives and means sometimes cannot be drawn, and in many cases the client-lawyer relationship partakes of a joint undertaking. In questions of means, the lawyer should assume responsibility for technical and legal tactical issues, but should defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected. Law defining the lawyer's scope of authority in litigation varies among jurisdictions.

In a case in which the client appears to be suffering mental disability, the lawyer's duty to abide by the client's decisions is to be guided by reference to Rule 1.14.

Independence from Client's Views or Activities

Legal representation should not be denied to people who are unable to afford legal services, or whose cause is controversial or the subject of popular disapproval. By the same token, representing a client does not constitute approval of a client's views or activities.

Services Limited in Objectives or Means

The objectives or scope of services provided by a lawyer may be limited by agreement with the client or by the terms under which the lawyer's services are made available to the client. For example, a retainer may be for a specifically defined purpose. Representation provided through a legal aid agency may be subject to limitations on the types of cases the agency handles. When a lawyer has been retained by an insurer to represent an insured, the representation may be limited to matters related to the insurance coverage. The terms upon which representation is undertaken may exclude specific objectives or means. Such limitations may exclude objectives or means that the lawyer regards as repugnant or imprudent.

An agreement concerning the scope of representation must accord with the Rules of Professional Conduct and other law. Thus, the client may not be asked to agree to representation so limited in scope as to violate Rule 1.1, or to surrender the right to terminate the lawyer's services or the right to settle litigation that the lawyer might wish to continue.

Criminal, Fraudulent and Prohibited Transactions

A lawyer is required to give an honest opinion about the actual consequences that appear likely to result from a client's conduct. The fact that a client uses advice in a course of action that is criminal or fraudulent does not, of itself, make a lawyer a party to the course of action. However, a lawyer may not knowingly assist a client in criminal or fraudulent conduct. There is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity.

When the client's course of action has already begun and is continuing, the lawyer's responsibility is especially delicate. The lawyer is not permitted to reveal the client's wrongdoing, except where permitted by Rule 1.6. However, the lawyer is required to avoid furthering the purpose, for example by suggesting how it might be concealed. A lawyer may not continue assisting a client in conduct that the lawyer originally supposes is legally proper but then discovers is criminal or fraudulent. Withdrawal from the representation, therefore, may be required.

Where the client is fiduciary, the lawyer may be charged with special obligations in dealings with a beneficiary.

Paragraph (d) applies whether or not the defrauded party is a party to the transaction. Hence, a lawyer should not participate in a sham transaction; for example, a transaction to effectuate criminal or fraudulent escape of tax liability. Paragraph (d) does not preclude undertaking a criminal defense incident to a general retainer for legal services to a lawful enterprise. The last clause of paragraph (d) recognizes that determining the validity or interpretation of a statute or regulation may require a course of action involving disobedience to the statute or regulation or of the interpretation placed upon it by governmental authorities.

Rule 1.3 - Diligence

A lawyer shall act with reasonable diligence and promptness in representing a client.

COMMENT:

A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and may take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer should act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf. However, a lawyer is not bound to press for every advantage that might be realized for a client. A lawyer has professional discretion in determining the means by which a matter should be pursued. See Rule 1.2. A lawyer's workload should be controlled so that each matter can be handled adequately.

Perhaps no professional shortcoming is more widely resented than procrastination. A client's interests often can be adversely affected by the passage of time or the change of conditions; in extreme instances, as when a lawyer overlooks a statute of limitations, the client's legal position may be destroyed. Even when the client's interests are not affected in substance, however, unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer's trustworthiness.

Unless the relationship is terminated as provided in Rule 1.16, a lawyer should carry through to conclusion all matters undertaken

Idaho Rules of Professional Conduct

The Idaho Rules of Professional Conduct became effective on November 1, 1986, (with subsequent amendments) by order of the Idaho Supreme Court. The IRPC are based largely on the ABA Model Rules of Professional Conduct, with some Idaho variations.

The Idaho Supreme Court adopted the IRPC in the form presented here, but did not adopt the comments. The comments have been included as an aid to the reader, but it must be specifically understood that they are included in the discretion of the publisher and not at the direction of the Court.

Conflicts between the Rules and the comments should be resolved strictly in favor of the Rules.

The comments are borrowed from the ABA Model Rules, except where underlining appears. Underlined comments represent changes included to reflect Idaho variations in the text of the particular Rule.

Client Lawyer Relationship

Rule 1.1 - Competence

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

COMMENT:

Legal Knowledge and Skill

In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question. In many instances, the required proficiency is that of a general practitioner. Expertise in a particular field of law may be required in some circumstances.

A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar. A newly admitted lawyer can be as competent as a practitioner with long experience. Some important legal skills, such as the analysis of precedent, the evaluation of evidence and legal drafting, are required in all legal problems. Perhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge. A lawyer can provide adequate representation in a wholly novel field through necessary study. Competent representation can also be provided through the association of a lawyer of established competence in the field in question.

In an emergency lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily required where referral to or consultation or association with another lawyer would be impractical. Even in an emergency, however, assistance should be limited to that reasonably necessary in the circumstances, for ill considered action under emergency conditions can jeopardize the client's interest.

A lawyer may accept representation where the requisite level of competence can be achieved by reasonable preparation. This

applies as well to a lawyer who is appointed as counsel for an unrepresented person. See also Rule 6.2

Thoroughness and Preparation

Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation. The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more elaborate treatment than matters of lesser consequence.

Maintaining Competence

To maintain the requisite knowledge and skill, a lawyer should engage in continuing study and education. If a system of peer review has been established, the lawyer should consider making use of it in appropriate circumstances.

Rule 1.2 - Scope of Representation

- (a) **A lawyer shall abide by a client's decisions concerning the objectives of representation subject to paragraphs (c), (d) and (e), and shall consult with the client as to the means by which they are to be pursued. A lawyer shall abide by a client's decision whether to accept an offer of settlement of a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.**
- (b) **A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.**
- (c) **A lawyer may limit the objectives of the representation if the client consents after consultation.**
- (d) **A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a**

IAC. Trial Counsel

Counsel for Barcella violated Idaho Bar Rules of Professional Conduct 1.2a) (Scope of Representation) by refusing Barcella's wishes to present character witnesses, present expert testimony on diminished capacity, expert testimony on snitches and to discuss Barcella's wishes to take the stand. see Kootenai Cty jail kites this section.

Trial Counsel violated Idaho Bar Rules of Professional Conduct 1.3 (Diligence) and 1.4 (Communication) by a lack of communication with Barcella concerning trial tactics, witness testimony, discovery, and by delaying any substantial work on Barcella's case until 3 days before trial. see Kootenai Cty kites

Trial

Trial Counsel violated Idaho Bar Rules of Professional Conduct 8.3 a), b) (Reporting Professional Misconduct) by not reporting unethical, illegal acts by prosecutors. see Kootenai Cty kites

IAC Trial Counsel

Mr Barcella asked his attorney to file charges with the judge, judicial counsel, State's Attorney and the Idaho Bar to take legal action against prosecutors' for suborning perjury and threatening witnesses throughout 1997 starting immediately after Barcella's preliminary hearing

Counsel for Barcella declined saying nothing would be done because prosecutors worked for the State. Prosecutor Lansing Haynes threatened Robert Agrifolio T.p. 1660, L18 - p. 1661, L1-10 and threatened George Lane T.p. 1630, L16 - p. 1657, L1-17

See Kootenai Cty jail kites #s 18 (08-13-97) and # 20 (08-13-97)

IAC Trial Counsel

Barcella's primary counsel Kootenai City Public Defender John Adams hired Atty Tim Gresback as secondary counsel. Barcella requested a different atty be appointed due to Atty Gresback's lack of experience in murder trials, particularly a death penalty case.

Atty Gresback was given only a minimal part in Barcella's defense and proved naive and inexperienced and allowed Sheriff's deputies to seize Court sealed MRI and EEG test results. Judge Haman ordered test results sealed even from himself and Atty Gresback should have picked up the results by hand.

Atty Gresback played no significant role in Barcella's defense and visited Barcella only to discuss hunting and fishing trips.

see Kootenai City notes in this book particularly #37 (09-03-97) #38 (09-03-97) #39 (09-04-97) and #40 (09-05-97)

③

I forgot three Character witness lists
and my versions of past conviction events,
etc. 2 bags were received in A.M. I didn't
get till midnight & they were opened & I
assumed photocopied for prosecution!

Just had a snotty piece of shit cop tell me
off for pushing my call button to see if I
can get in law library. It is not an "emergency"
button. Real scum here. Im on 23 hr lockdown, 1 hr gym.

They are pushing real hard for a physical
Confrontation. Sooner or later they'll start one. I see
it coming. Then I'll have to defend myself & I'll
get arrested & convicted for it. I am going to
beat this murder charge so they harass me con-
stantly.

Hope you can help. My Atty has 3,000 cases
under him & 5 more Atty's, 5 investigators. He says
he can't do anything about jail situation. He
could. Doesn't have time or want to be bothered.

Thanks,

Ray

P.S. A bench warrant was issued against me on Nov. 23. I still see no Discovery. My Attorney refuses to show me any or give me any. We had a prelim. I've not even seen motion for Discovery.

That I was considered one of the politest inmates in facility, not a threat to officers, and kept one of the cleanest cells & my room; but since I threatened inmate I would stay in red.

They also put threatening officers on ticket but report says I didn't threaten any officers. Sgt says don't worry.

The night I told them don't put Rapert in with me Sgt Rogers & about 6 other deputies bring me to a room (cell) with a drain in the floor. No bed, mattress, no toilet, nothing and told me they'd put me in there for a year till I go to trial.

Sgt Rogers was screaming in my face. Come on tough guy do something, what's on your tough mind, I should like that out of you.

I have confirmed Post Traumatic Stress disorder. I could have snapped. I've been to specialists for years for it.

Last time I was here Dr Kennedy call turkey me off 6-8 mg Xanax a day. I almost died. Im refused allergy medications, psychiatric records from Dr Thomas Boston. Cdr. Special. Had to get Court order for tranquilizers from psychiatrist.

Im tired of this abuse. There are a lot of petty mind games too, by rookies and older staff also. I will be suing them.

3 times a week we get 2 pieces baloney (fake), 2 heels bread, 2 pieces bread, 1 piece synthetic cheese and maybe a 4oz cup of plain macaroni.

Commissary prices are outrageous. I will be writing Correctional Association Board of Accreditation. Heat does not work in this part of jail or they don't turn it on.

Also when I get to use law library 1 hr for 1 hr. law library is for that. No Administrative duties. Please Respond. There's more even. Thank you,

②

I was thrown to ATF on 4-4-95 because local cops couldn't pin murder on me & did an illegal search. I'm a Fed prisoner doing 51 months for felon in possession of a firearm. The Fed. Marshall told me I'm a State or County prisoner with a Federal hold on me right now. I was just brought back from Federal prison where I was. Since Oct '95.

The Marshalls allegedly told staff here I would kill the first cop I could. I was placed in Administrative Segregation. No TV, No tennis shoes \$12.00 commissary instead of \$40 commissary. NO Human Contact. 2 months later I'm dropped to Assault. Escape risk but still no human contact. I'm in a 2 cell POD.

There is a small day room. Attached to it is a lg. day room, cellblock of 13 and phone. They had a block on CT area code for 2 months. It gets taken off so I don't have to be at their mercy to use phone in booking.

They put a man in next to me for attempted murder & rape on an 82 yr old woman. I told them get him out. They raise my level back to Ad/sec (Red). Take my tennis shoes. It's been 1 1/2 months now they want to make me go up to booking to use phone. It's been 1 1/2 mo. since incident.

Sgt Tommasini told me I'll never get in population. There are two other guys in here on Death Penalty murder I's. They have TV, phone.

I'm always leg shackled to go to Court. No one else is.

I'm in permanent segregation for a 75th degree assault 17 yrs ago. I have a 2nd degree assault in '91 also. People in here getting arrested for assault inside here during the days lockdown. I get permanent off the unit.

I was told at last classification hearing

Nothing else is considered legal work to them. Not witness lists, testimonies, Character references, etc.

I had to give legal work to cops twice to have copies made. They would not let me do it.

They also said Newspaper articles in my case were not legal work. I said - poisoning the jury pool and venue issues. Refused all work after. They talked to my Public Defender and he agreed to make all copies for me. He never copies anything I send him.

I am denied more than 2 personal letters a week because I'm indigent.

My Attorney has to bring me postpaid envelopes & 9x12" manilla envelopes because jail refuses to give me envelopes for legal mail. They said they would, but would have to read mail to be sure it was legal mail and still refuse envelopes anyway!

We are only allowed 2 2½" pencils to be sharpened once a day to do legal work, etc. only 1 a week to get an indigent list. Get real!

Sgt Tomassini told me if he caught me making a pencil extension (out of playing card, band-aids, etc.) he'd have me arrested for manufacturing A Deadly weapon in a correctional facility and attempted escape. Pencils dull beyond use in 1 hr - 2 at them.

I am denied legal paper to do legal work. Only letters to my Attorney and CT motions are legal work for them. My Attorney has to supply all my legal pads.

All of my legal MAIL was being opened till last week. I've been here over 4 months. Letters from my mitigation specialist, forensic psychologist, 2 psychiatrists, etc. and Investigator who are all known by staff are not considered legal mail qualified here. ID Code 501, 501, 503. Says different.

Gerald A. Isarce
P.O. Box 9000
5500 N. Government Way
Coeur d'Alene, ID 83816-9000

APC 0-4-11170
P.O. Box 1897
Boise, ID 83701

4/2/97

Dear Sirs,

I am presently incarcerated in the Kootenai County Public Safety bldg on a charge of Murder I w/ a weapons enhancement.

I feel that ~~my rights~~ are being violated specifically due to the fact the state has a very, very weak case on me.

Jail policy also varies as to which sergeant is on at the time. Jail policies in general are to harass and intimidate inmates and add as much inconvenience as possible.

I have written proof of many of the allegations I am about to describe in the form of answered kites.

I feel that also because my case is a Death Penalty case and the only evidence against me is hearsay and circumstantial and I do a lot of research work on my own for my Attorney my mitigation specialist and my investigator my right to due process is even more impeded.

The LAW LIBRARY is usually only available to me on 3rd shift because the administration claims it is being used for Classification, contact visits, etc. and other administrative purposes during the day usually. Which is bull-shit. It sits empty. I have plenty of "kites" returned "refused" at 430 AM, etc. I seem to be specifically targeted in this area.

I am denied access or even to have guard make copies of my legal work because I'm indigent. Copying machine is not accessible to inmates or near law library. I would be denied access to copy machine on anything but CT Filed motions anyway. 220

OFFICE OF THE PUBLIC DEFENDER OF KOTENAI COUNTY

Courthouse Plaza • 500 Government Way, Suite 300 • P.O. Box 9000 • Coeur d'Alene, Idaho 83816-9000
(208) 664-1347 • FAX (208) 769-4475

March 11, 1998

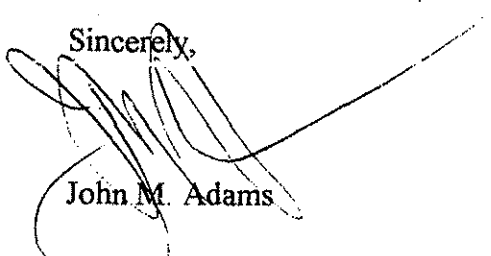
Christina R. Awadalla
Idaho State Bar
P.O. Box 895

Re: Complaint of Gerald Barcella
ISB File No. 97-C 191 C

Dear Ms. Awadalla:

I wrote you a letter yesterday regarding the above-referenced complaint. In that letter I informed you that Mr. Barcella had worked out his problems with Mr. Gresback's office and had some time ago agreed that his hand written notes would be mailed to him in the future. However, this morning Mr. Barcella left a message on my voice-mail in which he, inter alia, stated that he has changed his mind about his paperwork. He now requests that he be given his hand written notes immediately. He also requests that he receive a copy of the jury instructions from his trial. Therefore, I have called Mr. Gresback's secretary and asked her to deliver those documents to me so that I may copy them and deliver them to the county jail for Mr. Barcella. Once those materials are delivered, I believe that Mr. Barcella will have a complete copy of everything that I have on his case (including his own copy of each of the 638 kites he has sent me through January 27, 1998) except copies of the crime scene and autopsy photos and my own attorney notes. And, I will inform you now that I have absolutely no intention of making copies of those items for Mr. Barcella.

Sincerely,



John M. Adams

cc: G. Barcella
T. Gresback



Idaho State Bar

525 West Jefferson P. O. Box 895 Boise, Idaho 83701 PH: (208) 334-4500 FAX: (208) 334-4515

OFFICE OF BAR COUNSEL

Michael J. Oths
Bar Counsel

Jo-Ann L. Bowen
Assistant Bar Counsel

Christina R. Awadalla
Investigator

Sue Nelson
Secretary

Linda R. Pruitte
Administrative Assistant

March 5, 1998

PERSONAL & CONFIDENTIAL

John Adams
Kootenai County Public Defender's
P.O. Box 9000
Coeur d'Alene, ID 83701

Re: Complaint of Gerald Barcella
ISB File No. 97- C 191 C

Dear Mr. Adams:

Our office recently received correspondence from Gerald Barcella. Mr. Barcella indicates that he is your client in a criminal matter. Mr. Barcella expressed concern about not getting discovery items that he claims he provided to you, despite his request for you to return them.

Bar Counsel requests that, to the extent you are obligated under IRPC 1.16, that you contact your client within **ten (10) days**, and provide information and assistance accordingly. **Please inform Bar Counsel** if you are unable to comply or if you do not feel you are obligated.

By copy of this letter, we request Mr. Barcella write the Bar if he does not receive satisfactory communication from you by March 16, 1998.

Thank you for your immediate attention to this matter.

Sincerely,

Christina R. Awadalla
Investigator

cc: Gerald Barcella



Idaho State Bar

525 West Jefferson P. O. Box 895 Boise, Idaho 83701 PH: (208) 334-4500 FAX: (208) 334-4515

OFFICE OF BAR COUNSEL

Michael J. Oths
Bar Counsel

Jo-Ann L. Bowen
Assistant Bar Counsel

Christina R. Awadalla
Intake Coordinator

John Huffer
Paralegal

Sue Nelson
Secretary

Linda R. Pruitte
Administrative Assistant

September 3, 1997

PERSONAL & CONFIDENTIAL

Mr. John Adams
Kootenai County Public Defender's
P.O. Box 9000
Coeur d'Alene, ID 83816-9000

Re: Grievance of Gerald Barcella
ISB File No 97- C 191 C

Dear Mr. Adams:

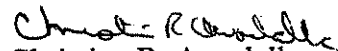
The Idaho State Bar recently received correspondence from Gerald Barcella. Mr. Barcella indicates that he is your client in a criminal case. Mr. Barcella expressed concern about problems with communication between the two of you. He claims you have not kept him informed of his case, specifically with things you have learned through discovery.

Bar Counsel requests that, to the extent you are obligated under IRPC 1.4, that you contact your client within **ten (10) days**, and provide information and assistance accordingly. **Please inform Bar Counsel** if you are unable to comply.

By copy of this letter, we request Mr. Barcella write the Bar if he does not receive satisfactory communication from you by September 15, 1997.

Thank you for your anticipated cooperation.

Sincerely,


Christina R. Awadalla
Intake Coordinator

cc: Gerald Barcella

Ineffective Assistance of Counsel

Attorney Adams and Attorney Grerback

Attorney Adams refused to allow Gerald Barcella to view videotapes, photos or listen to recordings of police interviews of state's witnesses. This resulted in 27 pages of transcripts being withheld by the prosecution of Rikki Bobo Tp 981, L. 25 - p 982, L 1-8. The withheld transcripts contained substantial information that directly related to material elements of the crime Tp 988 L 1-4.

Attorney Adams appeared unprepared to the jury. Defense counsel stated that trying to go back and cross-examine would not be as effective as presenting her with this information at the time of cross-examination.

Barcella had to hound Atty Adams to see discovery in his case so he could assist in his defense. Atty Adams told Barcella he could have Investigator Durant in the field or going over evidence with Barcella. Not both. See Keoteari City jail kites #2 (08-19-97) #3 (08-19-98)

Mr. Barcella's defense, did not allot enough time to Barcella's investigator Mark Durant and did not effectively or significantly communicate with Mr. Barcella.

See Keetonai Cty. Jail kites #4 (06-30-97), #6 (07-02-97), #7 (07-02-97), #9 (07-06-97), #10 (07-13-97), #11 (07-13-97), #13 (07-19-97), #19 (08-13-97), #21 (08-14-97), #22 (08-14-97), #29 (08-19-97), #30 (08-19-97), #32 (08-30-97), #34 (09-01-97), #36 (09-02-97), #38 (09-03-97).

Atty Adams and Mr. Barcella did not see "eye-to-eye" and Atty Adams was callous, argumentative and did not follow Barcella's directions or ~~had~~ nor Barcella's requests.

Mr. Barcella was in a constant state of communication with Atty Adams by U.S. mail and Keetonai Cty. Jail kites complaining to Atty Adams and even sought help from the ID State Bar and Idaho ACLU.

See letter to ACLU by Mr. Barcella (04-02-97), ID State Bar letters to Atty Adams (09-03-97) and (03-05-98).

and letter to Idaho Bar from Atty Adams concerning Barcella's complaints (03-11-98)

IAC Trial Counsel

Trial Counsel failed to subject the Prosecution to meaningful adversarial Challenge.

The weekend directly preceding Mr. Barcella's trial on Monday his two attorneys and investigator prepared Barcella's defense.

Main Counsel Atty John Adams saw Barcella only a couple times in a year to discuss anything significant with him and went several months between visits.

See Hootenair City Jail letters #7 (07-02-97) and #38 (09-03-97)

Secondary Counsel Atty Tim Gresback played a minimal part in Barcella's defense and at visits discussed only upcoming fishing and hunting trips. Gresback played only a token role.

Atty Adams oversaw 3,000 ongoing cases during his representation of Mr Barcella
T. prelim Tr. p. 10, L3-6 including 7 defendants on First degree Murder Charges, several death row appeals and his own case load.

Atty Adams told Mr. Barcella his only concern was to keep Barcella from being executed. Atty Adams was too busy to adequately prepare

I.A.C. Trial Counsel

Throughout the 13 months between his arraignment and trial Barcella repeatedly told trial counsel the prosecution was withholding evidence. Barcella's claims were rebuked by trial counsel even though Barcella had proof of undisclosed evidence see affidavits of Federal Defender Ruben Enríquez and Investigator Gabe Caballero

At trial many prior bad acts of Barcella were proffered along with many undisclosed items and testimony

T.p. 360 L 22 - p 367 L 1-11 T.p. 1109 - p 1113, L 1-20

and T.p. 1200 L 21 - p 1221, L 1-16

Trial counsel appeared argumentative, unprofessional and unprepared in cross-examining witnesses T.p. 1431, L 20 - p 1432 L 1-4

Barcella wanted his attorneys to formally complain to officials after repeated discovery requests went unheeded and prosecutors trickled discovery to defense attorneys.

Anything less than Judicial review could have

remedied the situation see Kootenai Cty jail kites

11 (07-13-97), # 12 (07-14-97), # 17 (08-14-97), # 18 (08-13-97),

19 (08-13-97), # 20 (08-13-97), # 21 (08-14-97), # 22 (08-14-97)

26 (08-15-97), # 28 (08-17-97), # 29 (08-19-97), # 30 (08-19-97)

34 (09-01-97), # 36 (09-02-97), # 40 (09-05-97), # 38 (09-03-97), # 27 (08-17-97)

I.A.C. Trial Counsel

Trial counsel did not adequately familiarize themselves with discovery materials and thereby weren't able to present a significant adversarial challenge or a viable defense

Barcella repeatedly made telephonic contact mail contact and contact through Kootenai Cty jail kites requesting communication about trial discovery to no avail.

Non-familiar with discovery allowed non-disclosed in at trial T.p. 482 L24-p 483 L1-11
T.p. 557 L6-16, allowed prior bad acts of defendant to be allowed in at trial
T.p. 1429-p 1432 L1-25

See Kootenai Cty. Jail kites # 04 (06-30-97),
9 (07-06-97), # 10 (07-13-97), # 11 (07-13-97), # 12 (07-14-97),
17 (08-12-97), # 18 (08-13-97), # 19 (08-13-97),
20 (08-13-97), # 21 (08-14-97), # 22 (08-14-97), # 26 (08-15-97),
27 (08-17-97), # 28 (08-17-97), # 29 (08-19-97), # 30 (08-19-97),
32 (08-30-97), # 34 (09-01-97), # 36 (09-02-97),
38 (09-03-97), # 40 (09-05-97)

FAC Trial Counsel

Mr Barcella's attorney did not allot sufficient time to his investigators to adequately do their job.

Barcella repeatedly complained to his attorney over lack of timely and proper pretrial investigation, witness interviews, refusal to allow Barcella to hear snitch interview tapes or watch video evidence and a severe personality conflict with his investigator

See Kootenai Cty jail kites #10 (06-21-95), #14 (08-09-97), #16 (08-02-97) #23 (08-19-97), #17 (08-12-97) #18 (08-13-97) #19 (08-13-97) #20 (08-13-97) #21 (08-14-97) #22 (08-14-97) #23 (08-14-97) #27 (08-17-97) #28 (08-17-97) #33 (09-01-97), #34 (09-01-97), #38 (09-03-97)

#17 (08-12-97), #18 (08-13-97), #19 (08-13-97),
#20 (08-13-97), #21 (08-14-97), #22 (08-14-01),
#26 (08-15-97), #27 (08-17-97), #29 (08-19-97),
#30 (08-19-97), #34 (09-01-97), #36 (09-02-97),
#38 (09-03-97), #40 (09-01-97), #33 (09-01-97),
#28 (08-17-97)

Barcella also complained of a lack
of witness interviews several times in 1997
by U.S. mail and Kootenai City jail kites
#3 (06-27-97), #6 (07-02-97), #9 (07-06-97), #11 (07-13-97),
#29 (08-19-97), #30 (08-19-97), #33 (09-01-97),
#34 (09-01-97) Also about lack of witnesses
being subpoenaed

Also see letters to ID Bar from Barcella
of 04-02-97

Also letter from ID Bar to Atty John Adams
of 09-03-97 and 03-5-98

letter to ID. Bar from Atty Adams 03-11-98

IAC Trial Counsel

Conflict of Interest

Barcella's attorney John Adams oversaw 3,000 cases, approximately 13 attorneys, the entire Public Defenders Office operations, 2 investigators, several deathrow appeals, sub-contracted several cases to conflict attorneys and was Chief Counsel for at least 7 defendants in 6 first degree murder cases while representing Barcella plus an enormous caseload under himself as chief counsel.

pretrial motions p 10, 21-6

Barcella repeatedly complained to his attorneys about a lack of communication and a lack of work on his case by U.S. mail and Kootenai Cty jail kites #4 (06-30-97) #6 (07-02-97), #7 (07-02-97), #9 (07-06-97), #10 (07-13-97) #11 (07-13-97) #13 (07-19-97), #19 (08-13-97) #21 (08-14-97), #22 (08-14-97), #29 (08-19-97) #30 (08-19-97), #32 (08-30-97) #34 (09-01-97) #36 (09-02-97), #38 (09-03-97)

Barcella complained by mail and Kootenai Cty. jail kites about lack of familiarity with discovery, withheld discovery by prosecution and Barcella's attorney's withholding discovery from Barcella. 23

see Kootenai Cty jail kites #11 (07-13), #12 (07-14-97)

IAC Trial Counsel

Barcella's defense was prejudiced by the cumulative impact of errors by trial counsel during pretrial, trial and sentencing phases and when the prejudicial impact of defense Counsel's errors is added to the multitude of prosecutorial misconduct and judicial errors a manifest injustice resulted.

Also see Barcella's appeal.

INEFFECTIVE

ASSISTANCE

OF
Counsel
(Trial)

Take Judicial Notice of underlying
Criminal File Including Transcripts

Mr. Barcellas 5th, 6th, 8th, and 14th
amendment rights were violated by his
trial attorney's ineffective assistance of
Counsel which also resulted in due process
violations, right to confront witnesses violated
access to courts violated, and right to be
free from cruel and unusual punishment
violated

False and Perjured Testimony of Officer Christie Wood

Trp 303, L3-L21 Officer Wood gave false testimony the defendant showed her his Idaho Drivers license and gave a statement. Defendant did not have a drivers license. See plaintiffs' exhibit of defendant's Identification card.

Prelim Trp. 85, L3-9 Officer Wood testifies to statements allegedly made by defendant not in her crime-scene reports.

Prelim Trp. 87, L24-p 88 L1-15 Officer Wood testifies she wrote her Police report about Gerald Barcella four (4) days after she was at crimescene when Barcella became the main suspect.

Prelim p 481, L5-9 The judge talks about inconsistent witness testimony and credibility issues of witnesses.

T.p. 1432 L19-p 1433, L1-3 The district Court noted Barcella's conviction depended on the credibility of witnesses. There were no eyewitnesses nor physical evidence.

The Jury used False and Perjured
Testimony of Officer Christie Wood
to convict Gerald Barcella of
Murder in The First Degree

This violated Barcella's 5th, 6th, 8th, and
14th amendments rights under the U.S.
Constitution and Idaho Constitution
and expanded and similar rights, to
due process, right to confront witnesses,
effective assistance of counsel and the
right to be free of cruel and unusual
punishment stemming from an unfair
process. Barcella states his rights were
violated due to this testimony on its own
or cumulatively with other perjured testimony
TAKE JUDICIAL NOTICE OF UNDERLYING CRIMINAL
FILE INCLUDING TRANSCRIPTS

Perjured Testimony of Norm Bennett

Prelim Tr. p 246, 11-6 Bennett testifies he heard Kenneth Thrift's voice. Testimony and police interviews of Brad Bahey and Bill Solberg show Bennett is wrong again.

Prelim p 481, 15-9 The judge talks about credibility issues of witnesses and inconsistent testimony.

Tr. 414, 120 - p 416, 11-17 Cpt Bergh testifies Norman Bennett had multiple contacts with him discussing the case.

Tr. 898, 119 - p 902, 11-19 Either Bennett or Thrift is lying. Testimonies do not match.

Tr. 904, 119 - p 905, 11-3 Again Bennett's testimony doesn't match Thrift's. Someone is lying.

Tr. 902, 120 Bennett presented false testimony that defendant and Thrift left Harmony House at 4:20 am.

Testimony of Bobo and Thrift dispute this. In 27 pages of withheld Bobo police interview transcripts she said Barcella called her from Denny's restaurant after 6:00 am and the waitress was taking dishes away at 7:00 am.

Prelim. p 481 15-9 The judge talks about credibility issues of state's witnesses and inconsistent testimony.

Tr. p 1432 119 - p 1433 11-3 The district court noted Gerry Barcella's conviction depended on the credibility of the witnesses. There were no eyewitnesses nor physical evidence.

The Jury found the defendant guilty
from perjured Testimony of Norman Bennett

Prelim Tr, p 219, L 1-2 Norm Bennett says he couldn't
recognise the voices of the two "drunks" on 04-02-9:

At trial he testified he could

Prelim Tr p 226, L 2 - p 228, L 1-23 Bennett is being
~~uncooperative~~ in answering whether he conducted
Police interviews after the week proceeding Bill
Sm. th's death and perjures himself

Prelim Tr, p 226, L 7-21 Shows Bennett got information
on case from police.

Prelim Tr p 232, L 1-13 conflicts with testimony of
Kenneth Thrift that defendant was hostile towards
victim. Someone is lying

Prelim Tr, p 229 Bennett and Thrift swapped infor-
mation on case.

Prelim Tr p 240 L 23-25, p 241 L 1-9 At prelim Hearing, Bennett
says he thought the second thump he heard was one
of the drunks falling down the stairs. At trial he
says he heard a body hit the floor directly above
his room.

Prelim Tr p 244, L 17-19 Testimony of Rikki Bobo
shows Bennett is mistaking or lying about defendant
and Ken Thrift leaving the building at 4:20 am

Prelim Tr p 238, L 14-25, p 239 L 1-3 Bennett's testimony and
Ken Thrifts do not match. Someone was not there

The jury relied upon the False and Perjured Testimony of Norman Bennett to Convict Gerald Barcella of murder I either singularly or cumulatively.

The outcome of Mr Barcella's trial was effected by the false and perjured testimony of Norman Bennett denying Barcella his 5th, 6th, 8th, and 14th Amendment rights

Take Judicial Notice of underlying Criminal file including Transcripts

False and Perjured Testimony

Virginia Wylena Smeltzer

Smeltzer lied to jurors Barcella had a duffel-bag with him at the watering Hole Bar T.p. 499, L14-21

Rikki Bobo told police Barcella had a bag with him and wanted to go to a bar a week before Smith's death in a police interview.

Someone gave Smeltzer this lie. William Solburg told police Barcella had no duffel-bag with him at the Wateringhole Bar or when they went to the shady rest bar in Rathdrum.

Bobo made no mention of any guns missing from Barcella's apartment when she allegedly cleaned it on 04-02-95 T.p. 689, L9-17 and said she saw a polaski she told police in her interviews was next to Barcella's guns.

False and Perjured Testimony Virginia Wyline Smeltzer

T. p. 1432 219 - p 1433, 21-3 The district Court noted Barcella's conviction depended on the credibility of state witnesses. There were no eye witnesses nor physical evidence

prelim p 481 25-8 The judge talks about credibility issues of state's witnesses and inconsistent testimony

prelim p 72 117 - p 73 11-11 Police reports of George Christman show Ken Thrift was the person Bill Smith was having problems with.

T. p. 791, 17-12 Testimony of Bobo about "those drunks over there" shows state of drunkenness at Thrift, Bakie and others at Harmony House. Defendant often saw Thrift yelling at Bill Smith in arguments over loud parties.

T. p. 755, - p. 756, 21-4 Note of Bill Smith shows he was not scared of Gary Barcella

T. p. 800 119 - 801 110 Testimony Bobo was with defendant when he found note and it was no big deal. Discredits Smeltzer's testimony

Police Interviews of Bill Solberg show Smeltzer's testimony of threats by Barcella to be false.

False and Perjured Testimony Virginia Wylene Smeltzer

Tp 502, 214 - p 504 21-18 Its obvious Smeltzer is lying on the stand repeatedly. See Police interviews of Smeltzer. Bill Smith never told Smeltzer he was afraid of Gerry Barcella.

Tp 505 27 - p 508 211 Smeltzer is being argumentative and deceitful about receiving her police interview transcripts from Prosecutor Haynes.

Tp 509 210 - p 510 Smeltzer again perjures herself

Tp 511, 21-12 Smeltzer admits she gave her police interview ^{almost} eighteen months after Bill Smith's body had been found and police contacted her. She said she was Bill Smith's best friend.

Tp 504 212-20 Smeltzer was blurtting out she lied to police but caught herself.

Rikki Bobo built the case against Gerald Barcella for the state and had police contact Virginia Wylene Smeltzer.

Smeltzer is a jewish lesbian and bar tended at a bar frequented by homosexuals and lesbians and would be naturally predisposed to lie to damage defendant for the sign on his door.

The Watering Hole bar where Smeltzer continued 241 to work became Mick Mac's, a gay and lesbian bar. Smeltzer was a friend of Brad Bakey also.
206

False and Perjured Testimony Virginia Wylene Smeltzer

T.P. 486 - p 487 1-3 Smeltzer states Bill Smith did not like Barcella's sign and was not a prejudiced man. See T.P. 803, p 804 defendants exhibit A Note from "Bill" on door. Also see T.P. 800, 1-18 - p 801, 1-9 and T.P. 804, 2-9-15

concerning sign on Barcella's door. The note from Bill said: "The owner, Peter Cooper came by today and called me about your door sign. While he may not agree with you, (I certainly do) the terms used are illegal in this type of building. Moreover he does not want any individualized doors (this means no holiday messages or wreaths) at most a simple memo pad and pencil will be allowed. Bill" Lies by Smeltzer

T.P. 804 1-16 - p 805, 1-18-3 Testimony of Rikki

13060 That after Bill Smith was killed Peter Cooper tried to rent a bigger apartment to

Barcella and Bobo. No problems with Barcella and Smith T.P. 511 1-15 Police had to go to Smeltzer

to get a statement from her over a year and a half after Bill Smith's death on a tip from Rikki Bobo

T.P. 488 - p 492 repeated injury by Smeltzer concerning who Bill Smith was scared of.

The Jury Found Gerald Barcella Guilty
of MURDER I Through The False and
Perjured Testimony of ^{Virginia} Wylene Smeltzer

The false and perjured testimony proffered
by Wylene Smeltzer contributed singly
or by cumulative effect to Gerald Barcella's
conviction in violation of Barcella's 5th,
6th, 8th, and 14th amendment rights to the
U.S. Constitution and Idaho Constitution and
similar and expanded rights to be able to
confront witnesses, due process, effective
assistance of counsel and to be free from
Cruel and Unusual punishment from being
convicted through an unfair process.

TAKE JUDICIAL NOTICE OF UNDERLYING CRIMINAL
FILE INCLUDING TRANSCRIPTS.

Tp 799, 219 - p 805, 21-3 Shows Smeltzer's
testimony false. Bobo testified Barcella was
alone with Bobo when he found note from
Bill Smith. Note was conciliatory. Smith was
not wound.

Tp 484, 22 - p 496 21-3 Smeltzer admits she lied to
jury that Bill Smith stated defendant's name
when he complained about a troublesome individual
Testimony was also different from police interviews

False and Perjured Testimony George Lane

T.p. 1237, L 21-24 Mr Haynes: "Mr. Lane, have you received any benefits from the prosecution in exchange for giving your statement to the police or testifying"? A: No.

T.p. 1241, L 5 - p. 1246, L 1-6 Lane repeatedly asked to have his charges dropped in exchange for his testimony. Lane received a "order" instead of life and twenty eight years.

T.p. 1262, L 19 - p. 1263, L 1 Lane admits lying on the stand

T.p. 1263, L 25 - p. 1264, L 1-3 Lane had the wrong murder weapon.

T.p. 1266, L 1 - p. 1267, L 1-13 Lang lies. Noone was allowed to talk to Barcella who was highly monitored.

T.p. 1269 L 23 - p. 1270, L 1-20 Lang is caught in two lies in earlier testimony.

T.p. 1275 L 9-25 Lang again caught lying as to seeing information on Barcella's case.

False and Perjured Testimony George Lane

George Lane's cell was probably fifty to one hundred feet away from Barcella's cell.

T.p. 1178, L14-17

There were no three inch opening in doors only a $\frac{1}{2}$ " crack between sliding plexiglass door and plexiglass wall. Barcella was on "no human contact" status and closely monitored by jail staff in a promontory. Anyone talking to Barcella was sent to punitive segregation.

T.p. 1179 L12-18. perjury again.

Again Lang lies T.p. 1181 L23 - p. 1183, L1-3
T.p. 1184 - p. 1185, L1-2 Petitioner contends Lang was given information by Police officer and/or prosecution to bolster his testimony and to be consistent with other snitches.

Lang lies about his ^{aggravated} assault on an officer conviction T.p. 1281, L4 - p. 1286 L1-25

Much of the content of Lane's testimony was available through T.V., newspaper articles and gossip T.p. 1232, L16 - p. 1237 L1-25

False and Perjured Testimony George Lane

witnesses into testifying.

George Lane faced approximately twentyeight years in prison plus possible life-in-prison for habitual offender for assault on a police officer. Prosecution contended Lane got nothing for his testimony against Barcella yet Lane only got a three or six month "rider." Lane also had a probation violation

T.p. 1757, L 4-10

Prosecutors bolstered Lanes testimony

T.p. 1759, L 17-19, T.p. 1786, L 23 - p 1782, L 1-3

George Lane told the jury Barcella had gotten away with two other shootings insinuating Barcella had twice before murdered and would get away with Smiths murder. T.p. 1184, L 24 - p. 1185, L 1-2

George Lane lied to the jury he shared a cell with Gerry Barcella. Barcella was held in a totally different pod of the jail with a totally different dayroom. There was a long foyer area in front of pods A 1/2, A 3/4, and A 5-20. At most times there were at least twenty to thirty feet and two glass doors separating Barcella and Lane T.p. 1177, L 22-25

False and Perjured Testimony George Lane

Attorney Suzanna Graham told Lansing Haynes she wouldn't put up with his strong arm tactics T.p. 1652, L. 3-5.

Attorney Graham testified she received an apology from Haynes for the strongarm tactics to induce her client to testify.

T.p. 1652 L. 23 - p. 1653, L. 1-14.

Attorney Graham told George Lane if he didn't testify he could be held in contempt of Court and be flopped on his rider, and sent to prison with the petitioner.

T.p. 1655, L. 16-21

Atty. Suzanna Graham testified that her client, George Lane testified against Gerald Barcella because Lane was threatened by Prosecutor Haynes and felt compelled, pressured and forced to testify and such threats influenced his testimony.

T.p. 1656, L. 13 - p. 1657, L. 1-11

George Lane received a rider in exchange for his testimony alleges Barcella T.p. 1664, L. 6 - p. 1667 L. 1-6.

Prosecutor Haynes also threatened Robert Agrifoglio to testify. T.p. 1660, L. 18 - p. 1661, L. 1-10. shows Haynes ⁽²⁰⁰⁾ propensity for threatening 247

False and Perjured Testimony George Lane

Bryan Ames established witness tampering and prosecutorial misconduct when he testified that State's witness George Lane had been threatened by Prosecutor Lansing Haynes thereby forcing and compelling Lane to be an reluctant and coerced witness for the State T.p. 1590 - p 1603
L. 1 - 22

Attorneys Suzanna Graham and Glen Walker corroborated Bryan Ames testimony and further established witness tampering and prosecutorial misconduct T.p. 1630, 40/6 - p 1663, L 1-22

The testimony of George Lane corroborated prosecutor Haynes threatened him through his attorney Suzanna Graham T.p 1635, L 21 - p. 1636, 21-2

Attorney Suzanna Graham testified that her client George Lane was afraid he was being threatened to testify or he would lose his "ride" T.p 1648, L 3-13

Attorney Suzanna Graham testified of Lansing Haynes witness tampering and prosecutorial misconduct whereby her client was induced and compelled by the threats of Lansing Haynes to testify at trial T.p 1650, L 1 - p 1651, L 1-

False and Perjured Testimony George Lane

Gerald Barcella claims he never spoke to Lane except to reply "Hi" when Lane passed his dayroom area and said "Hi" to Barcella. Barcella was kept under no human contact conditions while housed in pod A-1 and under constant supervision of jail staff. Barcella had no reason to speak to Lang about his case.

Lang tried to back out of testifying falsely against Barcella but was forced to testify by Prosecutor Haynes or face loss of his "rider" and be sentenced to prison.

Lang received his second rider, which is illegal in Idaho, in exchange for his false testimony against Barcella. TAKE JUDICIAL NOTICE OF

UNDERLYING CRIMINAL FILE INCLUDING TRANSCRIPTS

prelim p. 481, L.5-9 The judge talks about credibility issues of the witnesses and inconsistent testimony.

Trial p. 1432, L.19 - p 1433, L.1-3 The District Court noted Barcella's conviction depended on the credibility of the witnesses. There were no eyewitnesses nor physical evidence.

7

The Jury used the False and
Perjured Testimony of George Lane
To Convict Gerald Barcella of
Murder In The First Degree

In using the false and perjured testimony
of George Lane to convict Gerald Barcella
of murder in the first degree the court
and jury violated Barcella's 5th, 6th, 8th,
and 14th amendment rights under the
U.S. Constitution and Idaho Constitution
and similar and expanded rights to due
process, right to confront witnesses, effective
assistance of counsel and the right to be free of
cruel and unusual punishment obtained from
an unfair process. George Lane was threaten-
ed to testify by Prosecutor Lansing Haynes
and Lane obtained personal information
about Gerald Barcella from police and/or
prosecutors to bolster his testimony. This
information including Barcella's siblings, their ages
and occupations could have come from nowhere else
as they reside in the state of Connecticut.
Prosecutor Haynes suborned perjury and prior
bad acts and criminal convictions of Gerry
Barcella through Lane's testimony obtained
by threats to Lane through Lane's attorney
Suzanna Graham. 1997

False and Perjured Testimony Brad Bakie

Prelim p 226, L2 - p 228, L1-23 Norman Bennett received information on case from police through repeated contact. Bennett, Thrift and Bakie are all friends. Also see prelim p 226, L27-21. Rikki Bobo kept in touch with police and relayed information about case to Kenneth Thrift who was a friend of Bakie's thereby getting testimonies to coincide more so. See prelim p 277, L23-25. Bobo talks about her close relationship with Det Wolf and Sgt. Fritz.

See Bobo's A.T.F. Statement about purchasing a pistol due to harassment from "Ronnie", a bisexual tenant of Harmony House and lover of Brad Bahey.

False and Perjured Testimony Brad Bakie

T.p. 800 L 14 - p 801, L 1-10 Bobo's testimony about Barcella finding "note from Bill Smith concerning "sign on door" discredits Bakie's testimony.

T.p. 804, L 9 - p 805, L 1-3 Cooper tried to rent Barcella a larger apartment after Bill Smith's death proving there were no problems between Gerry Barcella and Bill Smith of any severity.

Defendant contends Brad Bakie proffered false and perjured testimony to get back at Gerald Barcella for assaulting Bakie's homosexual lover Ronnie (see firearms case discovery and trial discovery) and for sign on Barcella's door which was put on due to Brad Bakie and "Ronnie". Bakie lived next door and visited Ronnie and Kenneth Thrift who both lived in Harmony house on a nightly basis engaging in drunken homosexual conduct. Prosecutor Haynes suborned this perjured and false testimony.

Prelim p. 72 L 17 - p 73, L 1-11 George Christman told police it was Ken Thrift who Bill Smith was 25: having problems with. 195 Thrift and Bakie are friends.

False and Perjured Testimony Brad Bakie

a .22 rifle into the upper wall/ceiling area at approx 2:00 am. on 04-01-95 or 04-02-95 when Thrift and Bakie were being noisy, and refused to quiet down. Bakie was repeatedly groping and sexually assaulting Thrift and Thrift kept yelling and beating on Bakie. See trial discovery, police reports and discovery from Barcella's firearms case.

T.p. 941, L.7-11 Bakie is caught lying. Also see

T.p. 942 L.7-11

T.p. 942 L.17-24 Bakie admits drinking heavily on 04-01-95 and 04-02-95 also see T.p. 943 L.7-10

T.p. 943 L.11-22 Shows Bakie lying about Barcella's alleged threats the night of Bill's death.

T.p. 945, L.2-6 Bakie testifies Bill Solberg was with defendant at Watering Hole bar. Solberg's police interviews discredit Bakie's testimony as to alleged threats by Barcella

T.p. 588, L.14-25 Testimony of Rikki Bobo

Concerning sign on door discredits Bakie's testimony about conflict between Barcella and Smith.

T.p. 791, L.7-12 Bobo talks about "those drunks over there" and their memory capabilities of weekend of Bill Smith's death

False and Perjured Testimony Brad Bakie

Prelim. p. 346, L. 2 - p 347, L 1-4 Testimony of Kenneth Thrift discredits Bakie's testimony defendant threatened Bill Smith's life at all, never mind ten times.

Tr. 916, L. 22 - p 917, L. 1-24 Bakie testifies he only knew Gerry Barcella from playing cards one month earlier. Defendant states he never told Bakie he wanted to do harm to Bill Smith and didn't know Bakie well enough to even discuss any personal business.

Tr. 922, L. 8-11 Bakie's testimony defendant threatened Bill Smith's life ten times does not match Bakie's prior testimony, Police interviews and is discredited through Police interviews of Bill Solberg, Rikki Bobo and Kenneth Thrift and testimony of Kenneth Thrift and Rikki Bobo.

Tr. 938, L. 12 - p 939, L. 1-3 Bakie testifies Kenneth Thrift told him what defendant's sign on door said. Thrift testified he couldn't read.

Tr. 939, L. 1-25 Brad Bakie lies he was not a homosexual. Gerald Barcella was unable to impeach Bakie due his lie. Defendant knocked unconscious Bakie's homosexual lover "Ronnie" how sexually assaulted Barcella at the Laker's Cafe a couple days before Bill 254 Smith's death. Barcella, 93 was also accused of firing

The Jury used False and Perjured Testimony of Brad Bakie to find defendant guilty of murder I

The jury found Gerald Barcella guilty of murder in the first degree in violation of the 5th, 6th, 8th, and 14th amendments to the U.S. Constitution and Idaho Constitution and similar and expanded rights. Defendant was denied due process, right to confront witnesses, effective assistance of counsel and to be free from cruel and unusual punishment stemming from an unfair process.

TAKE JUDICIAL NOTICE OF UNDERLYING CRIMINAL FILE INCLUDING TRANSCRIPTS

T.p. 1432 419 - p 1433, 41-3 The district court noted Gerry Barcella's conviction depended on witness credibility. There were no eyewitnesses nor physical evidence

prelim., p. 481, 45-9 The judge talks about witness credibility issues and inconsistent testimony.

False and Perjured Testimony Peter Cooper

T.p. 1432 L 19 - p 1433 L 1-3 The district Court noted Buccellai's conviction depended on the credibility of State's witnesses. There were no eyewitnesses or physical evidence

T.p. 595, L-8-18 Ken Thrift's testimony shows the money for Thrift's rent and \$50 he had Bill Smith hold for him were missing. Cooper's rent book was tampered with. Defendant alleges Cooper possibly pocketed money from Smith's room so he wouldn't have to pay taxes on it.

Prelim p 72, L 17-23 L 1-11 Police reports of George Christman show Thrift was the tenant Bill Smith was scared of and Thrift was often seen yelling at Smith's door.

The Jury Found Gerald Barcella Guilty
of murder I Through False and Perjured
Testimony of Peter Cooper

Top 619 - p 621 L1-4 Peter Cooper falsely testified
he talked to Gerry Barcella about the sign
on his door. Prelim testimony and police inter-
views dispute this testimony

Top 619, L25 - p 620, L1-6 Peter Cooper was answering
in the positive when interrupted by Judge
Bengsten then answered in the negative.

Top 621, L11-13 Now Cooper "doesn't recall".
whether he talked to Barcella. Interviews of
Rikki Bobo and Peter Cooper show he is/was lying.

Top 625, L15-17 Cooper blatantly lies he didn't
ask anyone to telephone for help. He yelled
for Gerry Barcella to knock on doors to get
phone to call 911 before he realized
Bill Smith had a phone in his room.

Top 804 L9 - p 805 L1-2 Testimony of Rikki Bobo that
Peter Cooper wanted to rent a large downstairs
apartment to Barcella and Bobo before and after
Bill Smith's death disputes Peter Cooper knew
of any problems with Barcella at Harmony
House. as Cooper committed perjury

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Prelim, p. 72 L17-25 Cooper's prelim testimony and trial
testimony about whether he secured door to Bill Smith's
apartment on 04-03-95 are different. One must be false
/90

The Jury found Gerald B. Galt guilty of murder through

False and perjured testimony of Peter Cooper

The false and perjured testimony of Peter Cooper affected the outcome of the trial either by itself or cumulatively in violation of Gerald Baccala's 5th, 6th, 8th, and 14th amendments to U.S. Constitutional and Idaho constitutional rights and expanded and similar rights to be afforded due process, effective assistance of counsel, right to confront witnesses and right to be free from cruel and unusual punishment stemming from an unfair process.

THE JUDICIAL NOTICE OF VIOLATING CRIMINAL FILE INCLUDING TRANSCRIPTS.

Re: Jim. P. 402, 115-4407, 11-21 Talks about

possible money in room. Peter Cooper was alone in Bill Smith's room after finding Smith's body. Several amount of money supposed to be in room were never accounted for and Cooper's books had entries by unknown persons. Sheds doubt on testimony of Kuhn, Boko and on Cooper's honesty.

Re: Jim. P. 481, 15-9. The Judge talks about credibility issues of the state's witnesses and inconsistent testimony.

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False and Perjured Testimony Robert Agrifoglio

Agrifoglio told Barcella's investigator Mark Durant he gave three statements to police. The defense was only given one.

False and Perjured Testimony Robert Agrifolio

Prelim p 93, 23-4 Agrifolio lies about his criminal record

Prelim p 103-p 108 21-9 Agrifolio lies about his criminal record.

Tp 953, 213-17 Atty Adams talks about Agrifolio perjuring himself.

Agrifolio told Barcella's investigator Mark Durant he made at least three statements or interviews with police but only one was provided to defense.

T.p. 1347 2, 15-21 Agrifolio refused to testify at Barcella's trial. The Court allowed Agrifolio's prelim testimony to be read into the record. Agrifolio was declared unavailable. T.p.

T.p. 1659 - p 1660 2, 1-17 Several times between preliminary hearing and trial Agrifolio called Barcella's investigator several times and stated the Prosecutor Lansing Hynes was pressuring him and threatening him to testify

T.p. 1659 - p 1660, 21-17 When Investigator Durant asked Agrifolio if he told the truth at Barcella's preliminary hearing Agrifolio asserted the 5th amendment right against self-incrimination.

False and perjured Testimony Robert Agrifoglio

weapon

T.p. 1416, L 22-25 Barcella told Agrifoglio he was a murder suspect. Agrifoglio concocted the alleged confession of Barcella because Agrifoglio was in Latah County seeking Post Conviction relief pro-se and was denied relief due his ineptness.

T.p. 1417 L. 14 - p. 1418, L 1-22 Agrifoglio again admits Barcella told him of what police were alleging against Barcella.

T.p. 1418, L 23 - p. 1419 L 1-8 Agrifoglio testifies Gerald Barcella never told him the murder weapon was his.

T.p. 1422, L 23 - p. 1423, L 1-4 Agrifoglio testifies Barcella told him he was in Shoshone Cty jail in Wallace for gun charges and is a homicide suspect. Defendant was not in Shoshone Cty jail for either. Goes back to Agrifoglio reading papers about death of puppy lawsuit.

T.p. 1367, L 1-7 Agrifoglio knew from Barcella's phone calls to his federal attorney about the "note from Bill" that Bobo turned over to Barcella's attorney.

False and Perjured Testimony Robert Agrifolio

Robert Agrifolio's testimony is rife with false and perjured statements. Agrifolio was nicknamed "Pinnocchio" by Gerald Barcella, because Agrifolio is a liar and a jail house snitch T.p. 1402, 415-425. The defendant contends he never told Agrifolio anything about killing anyone and that he (Barcella) was a suspect in a murder T.p. 1476, 222-225 and Agrifolio listened in on Barcella's phone conversations with his Federal attorney, Ruben Iniguez T.p. 1407, 46-49. Agrifolio perjured himself on the stand about being able to hear phone conversations T.p. 1407, 46-49. Agrifolio testified Barcella killed Bill Smith because Smith killed Barcella's puppy T.p. 1367, 41-7. This is shown to be a lie by Rikki Bobo's testimony T.p. 805, 222-223. Barcella acknowledges he had papers on a lawsuit he was preparing against Shoshone County for the death of one of his puppies in his cell and prisoners could not lock cells during the day at Latah County Jail and Barcella also had discovery from

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The Jury Found Gerald Barcella
Guilty of murder in the First Degree
Through the False and Perjured
Testimony of Robert Agrifolio

Barcella's 5th, 6th, 8th and 14th amendments
to the US Constitution, Idaho Constitution and
similar and expanded rights and right to
confront witnesses, due process, effective assistance
of counsel and right to be free from cruel
and unusual punishment gotten through an
unfair process were violated.

TAKE JUDICIAL NOTICE OF UNDERLYING CRIMINAL
FILE INCLUDING TRANSCRIPTS

prelim p. 481, L 5-9 The judge talks about
credibility issues of the witnesses and inconsistent
testimony.

Trial p. 1432, L 19 - p 1433, L 1-3 The District Court
noted Barcella's conviction depended on the
credibility of the witnesses. There were no
eyewitnesses nor physical evidence.

Robert Agrifolio was an illegally planted
jailhouse snitch used to secure testimony
against Gerald Barcella T.p. 1393, L 13 - p. 1394,
L 1-19

False and Perjured Testimony of Officer Kelly

T.p. 277, L 20 - p 281, L 1-21 Officer John Kelly tells jury the defendant Gerald Barcella asked him a question(s) at crime scene. Kelly's preliminary hearing testimony did not bear this out.

T.p. 283, L 10 - p 284, L 1-8 Officer Kelly refutes the highly prejudicial testimony he gave in last paragraph Perjury!

T.p. 285, L 15 - p 286, L 1-6 Its obvious Prosecutor had prearranged this perjury with Officer Kelly

T.p. 318, L 1 - p 322, L 1-18 Defense asks Judge to strike this highly prejudicial, perjurous and false statement of Officer Kelly

T.p. 322-416-16 Judge Bengsten concedes that the defense could have asked for a mistrial and that the bell could not be unrung concerning Officer Kelly's testimony.

T.p. 1432, L 19 - p. 1433, L 1-3 The district court noted Barcella's conviction depended on the credibility of the witnesses. There were no eye witnesses or physical evidence.

prelim. p. 481, L 5-9 The Judge talks about credibility issues of states witnesses and inconsistent testimony.

The Jury Considered the False and
Perjured Testimony of Officer John Kelly
to Convict Gerald Barcella of murder
in the First Degree

Gerald Barcella's 5th, 6th, 8th and 14th amend-
ment rights under the U.S. Constitution and
Idaho constitution and similar and expanded
rights. The defendant was denied his rights
to due process, effective assistance of counsel,
rights to confront witnesses and right to be
free from cruel and unusual punishment
received from an unfair process.

Take Judicial notice of underlying Criminal file
including Transcripts

False and Perjured Testimony Rikki Bobo

T.p. 1127 - p 1128, 11-16 Bobo gets out of jail for helping police

Tp 1133, 123 - p 1134, 11-5 Det. Wolf testifies Bobo wanted something for her testimony.

T.p. 1155, 15-8 Chet Parks of the Idaho State Forensics Laboratory testifies you can get blood and DNA off washed clothes.

Prelim p 402, 15 - p 407, 11-21 Sheds light on money never accounted for that was in Bill Smith's room. Casts doubt on veracity of Rikki Bobo about motive for "note found under door" about rent receipt for Barcella

T.p. 1432 19 - p 1433, 11-3 The district court notes Barcella's conviction depended on the credibility of witnesses. There were no eyewitnesses or physical evidence.

Tp 766, 19 - p 771, 11-2 Bobo caught lying as to Barcella's state of drunkenness or her opinion at time of crime.

T.p. 595, 18-18 Ken Thrafft's testimony shows not only Barcella's money for rent missing from Bill Smith's room but also Thrafft's rent money and \$50 Thrafft gave Smith to hold for him. Discredits Bobo's testimony on "note under door" allegations to throw blame off defendant.

False and Perjured Testimony Rikki Bobo

Tp. 796, L19-p 798, L1-9 Bobo's police interview where she tells police she would want defendant punished if he had killed Smith and he wouldn't tell her if he had killed someone

Tp 800 L19-p 801 L1-3 Bobo told police she was with defendant when he found the note on his door from Bill Smith and he took it down. No one else was present. Bobo lied when she told the jury Barcella argued with Smith over the note. The note was conciliatory towards Barcella.

Tp 816-p 820 Judge Bengsten committed reversible error by letting Rikki Bobo testify to defendant's feelings or state of mind

Tp 827 Inconsistent statement as to number of times defendant allegedly told Bobo he hit victim in the head.

Tp 831, L14-16 Bobo repeatedly lies under oath

Tp 832-p 834 Bobo testifies she was scared of defendant so she didn't report crime to police. This fear dissipated when she was facing a prison sentence.

Tp 844 Prosecution voided two prior felony convictions for Bobo in exchange for her testimony. so her current charge would be lessened.

False and Perjured Testimony Rikki Bobo

Trp 724, L14 - p 728, L1-20 Bobo testimony there may have been blood on defendant's clothes inconsistent with prelim testimony, police interviews and forensic evidence.

Trp 733, L17 - p 739 L1-3 Three reasons Bobo would present false testimony.

Trp 741, L15-25 Police showed Bobo photos of murder weapon and discussed evidence with her.

Trp 745 - p 746, L1-22 Inconsistencies.

Trp 766 Bobo lies about cleaning defendant's apartment. She had no key to get in.

Trp 767 Bobo caught in lies over defendant's state of inebriation.

Trp 771 L3 - p 776, L1-24 Bobo caught in lies over alleged amount of times defendant allegedly told her he hit Bill Smith in the head.

Trp 776, L25 - p 779, L1-14 Bobo caught lying about seeing blood on Barcella's clothing.

Trp 788 L23 - p 792, L1-5 again Bobo is caught in conflicting statements.

Trp 793, L18, 19 shows Bobo's will go to any length to make defendant look worse than he was to bolster her chances for leniency on her case. Bobo's statement Barcella was in a biker gang and Philadelphia and involved in a Columbian gang are preposterous. 269

False and Perjured Testimony Rikki Bobo

Trp. 680 L 16 - p 681, L 1-14 defendant wanted to question Bobo concerning her incarceration

Trp 680, L 16 - p 683 L 1-5 defendant wanted to question Bobo as to where, how and why she had on civilian clothes and makeup when she was a county prisoner.

Trp. 148, L 11-17 Judge Bengsten says several witnesses lied about what defendant said to them.

Trp 691 L 6 - p 692, L 1-7 Bobo proffers unsolicited and highly prejudicial testimony.

Trp 697 L 1-13 Bobo lies about defendant arguing with Bill Smith over "sign on door" (defendant's exhibit A). Inconsistent with prelim testimony and all police interviews.

Trp 704, L 13 - p 707, L 1-22 Bobo lies about "note under door". It was Bobo's idea to write note because defendant thought he had paid rent.

Trp 708, L 18 - p 709, L 1-6 Bobo says she was afraid to tell police Gerald Barcella killed Smith yet she testified against Barcella in Federal Court getting Barcella a 56 month Federal prison sentence and cooperated with local police and A.T.F. agents. See police interviews and ATF interviews and federal case appeal. ¹⁷⁶ 270

False and Perjured Testimony Rikki Bobo

Prelim, p. 481, L. 5-9 The judge talks about
credibility issues of witnesses and inconsistent
testimony.

False and Perjured Testimony of Rikki Bobo

Prelim p 326, L 20 - p 327, L 1-19 Bobo testified she worked at Sears. Ken Thrift often went to see her there and discuss case.

Prelim p 434, L 15-18 Detective Wolf testifies Bobo told him she knew nothing about Bill Smith's death.

Prelim p 441, L 20-25 Det. Wolf states victim's room was not searched for money putting doubt on Bobo's testimony defendant hadn't paid rent and had Bobo write note to deflect blame from defendant.

Prelim p 448, L 25 - p 449, L 1-3 Bobo never gave Wolf information on Bill Smith's death till 08-15-95 when she was arrested on an unrelated felony.

Prelim p 450, L 20-23 same as last entry.

Prelim p 461, L 21 - p 462, L 1-21 Wolf testifies police told Bobo she could lose her son if she didn't cooperate.

Prelim p 465, L 11-22 Wolf testifies it may have been Bobo who came up with the idea to wire a wire and try to get Ken Thrift to testify against Barcella. See Bobo/wire transcripts also.

Prelim p 466 L 8-12 Wolf talks about 'Bobo' running the show" during wiretap of Ken Thrift.

False and Perjured Testimony of Rikki Bobo

Barcella had a double-barrelled 12 gauge shotgun, 410 shotgun and .22 rifle next to his bed and did not need a .22 pistol to shoot police if he so chose.

Barcella's arrest was uneventful although Barcella could have easily shot the officers.
Prelim p 315, L 7-13 Doesn't match Police interviews before her felony arrest.

Prelim p 316 L 6-21 Police showed Bobo a photo of pulaski and told her it was the murder weapon several times

Prelim p. 317 L 14 - p 318 L 1-13 Only a fool would state someone bought a .22 Target pistol to shoot it out with police when defendant had a short 12 gauge shotgun, 410 shotgun and .22 rifle, as Bobo testifies.

prelim p. 321, L 20 - p 324, L 1-6 Bobo's testimony defendant wrote on his hand with pencil in jail visiting booth to give her a message. Pencil does not write on skin. Nothing is allowed in visiting booths at Keeterei County jail.

Prelim p 324 L 12 - p 325 L 1-25 Police threatened to take Bobo's kids and Bobo relayed this to Kenneth Thrift.

False and Perjured Testimony of Rikki Bobo

Prelim p. 281, L14-21 and p 282, L1-8 Bobo lies that she never talked to an attorney. Defendants discovery shows Bobo talked to two attorneys about Bill Smith's death.

Prelim p 283 - p 285, L1-7 Bobo says she was scared of defendant so she didn't tell police what she knew about Barcella killing Smith yet she testified against defendant in a federal gun case, defendant was incarcerated, Bobo was going to marry defendant and was trying to rent an apartment with defendant. Bobo's story didn't change till she was arrested on her third felony drunk driving charge.

Prelim p 300, L13-18 Inconsistent with Police interviews

Prelim p 301, L5-9 Inconsistent with police interviews

prelim p 303, L1-185 Bobo shamelessly lies that defendant gave her money to buy a pistol to shoot it out with Police. This is totally fabricated and different from Bobo's testimony in Federal Court, Police interviews, A.T.F interviews. Defendant had Bobo buy a .22 pistol to protect herself from "Ronnie", a bisexual rapist tenant at Harmony House and lover of Brad Bakey. Ronnie had been sexually ¹⁷²harrassing Bobo.

False and Perjured Testimony of R. khi Bobo

Prelim. p. 257, L 9-10 Bobo's statement inconsistent with police interviews

Prelim p 257, L 23 - p 258, L 1-4 inconsistent with Police interviews

Prelim, p. 262 L 15-25 testimony Bobo cleaned defendants apartment and saw pulaski proved false by her later testimony she had ~~no~~ key to enter defendants apartment

Prelim p 263 L 22-25 Inconsistent with police interviews defendants confession

Prelim, p 268, L 11-13 Inconsistent with police interviews concerning "note under door"

Prelim p 272, L 16-17 Bobo lies that she has never been convicted of a crime.

Prelim p 274, L 21-23 Bobo testified truthfully in Federal Court against Barcella. Why would she lie she knew nothing about murder if she did?

Prelim p 277, L 5-7 Bobo testifies she called Detective Wolf and Sargent Fritz to discuss the case "every once in awhile"

Prelim p 277, L 23-25 Bobo talks about her close relationship with Wolf and Fritz.

False and Perjured Testimony

Rikki Bobo

against Barcella

Tip p 605 - p 623 Testimony of Bill Hood shows poor character of Bobo as dishonest

Tip 1615 - p 1631 Testimony of Sharon Egners as to Bobo's poor character and dishonest reputation.

Plaintiffs exhibit #25 Imunity agreement for Rikki Bobo.

Court Exhibit #3 Investigative report of Rikki Bobo.

In using Rikki Bobo's false and perjured testimony against Gerald Barcella the jury violated Barcella's 5th, 6th, 8th and 14th amendments to the US Constitution and Idaho Constitution to due process, right to confront witnesses, effective assistance of counsel and the right to be free from cruel and unusual punishment received due to an unfair process. Bobo's testimony singly or cumulatively deprived defendant of a fair trial.

TAKE JUDICIAL NOTICE OF UNDERLYING CRIMINAL FILE
INCLUDING TRANSCRIPTS

The Jury Perjured Gerald Barcella
Through The Case

False and Perjured Testimony
Rikki Bobo

is radically different than her testimony in federal court where she also testified against Barcella. The ease with which Bobo changes testimony between different courts and hearings and her propensity to lie to police bear out her self-serving manipulative interests. Bobo blatantly perjured herself shamelessly over and over at trial. Rikki Bobo showed she will go to any length to stay out of jail.

Bobo stayed in close contact with prosecutor Lansing Haynes, Detective Wolf, Sgt Fritz, Kenneth Thrift and others to keep abreast of developing information concerning Smith's death so she could change her testimony as best suited the prosecution's and her interests.

Bobo single-handedly got Kenneth Thrift and Wylene Smelter to testify against Barcella and got police to let her wear a wire to try to get statements from Kenneth Thrift.

Bobo manipulated the mentally disabled Thrift into testifying

The Jury Found Mr Barcella guilty of
murder through the

False and Perjured Testimony Rikki Bobo

Rikki Bobo did approximately six (6) Police Interviews in which she denied any knowledge of Gerald Barcella killing Bill Smith.

On or about August 8, 1975 Bobo was arrested on felony drunk driving charges and told police and a prosecutor Gerald Barcella had confessed Smith's murder to her in exchange for her release on her own recognizance and help on her charge.

Bobo had co-operated with local and County police and A.T.F. agents after Barcella's arrest on firearms charges and testified against Barcella in Federal court getting him 56 months in prison yet denied any knowledge of Smith's death.

Barcella was not charged with Smith's death until Bobo gave her story to police and got Kenneth Thrift and Wylene Smeltzer to falsely testify against Barcella.

Bobo's police interviews after her arrest and subsequent Preliminary hearing and trial testimony are radically different than before her arrest. Bobo's testimony is rife with inconsistencies, lies and perjury. Bobo's ¹⁶⁸testimony in State Court

False and Perjured Testimony
Kenneth Wayne Thrift.

Bill Smith told Virginia Wylene Smeltzer
he was having problems with several tenants
T.p. 487, L.4-11

Several police reports and Buella contend
this was in particular Kenneth Wayne Thrift
and his boisterous, homosexually promiscuous partners
"Ronnie", Brad Bahie, and David Overcash.

Police interviewed the female tenant in
the room next to Bill Smith's room. She
told police she was afraid of Kenneth
Thrift and David Overcash and that they
had tried to sell her drugs and police
should investigate them for Bill Smith's
murder. See police reports

heard Barcella arguing with Smith, then saw Barcella wiping off Smith's door knob. Thrift told the jury Barcella told him Barcella told him he (Barcella) killed Smith. Thrift said they left the Watwinghole Bar at 2:00 am. Barcella has an alibi in Bill Solberg he was in Rathdrum and didn't arrive at 205 Indiana till 3:00 or 3:15 am. T.p 471, L9-22

Rikki Bobo said only Bill Solberg "John" and Barcella were at the Watwinghole when she left at approx 10:00 pm. T.p. 770, L2-10.

Norman Bennett in police interviews put Ken Thrift in the hallway of 205 Indiana at 1:00 am, see police interview reports of 04-06-95 (Norman Bennett)

False and Perjured testimony Kenneth Thrift

T.p. 1432 L.19 - p 1433 L.1-3 The District Court acknowledged Barcella's conviction depended on the credibility of the witnesses. There were no eyewitnesses nor physical evidence.

Prelim p 481 L.5-9 The judge talks about credibility issues of the witnesses and inconsistent testimony.

T.p. 746, L.14-21, Bobo told police she thought Thrift stole pulaski or similar tool from Barcella when Thrift carried tools in boarding for Barcella. Police threatened Thrift to co-operate.

T.p. 755 - p 756, L.1-4 Shows Thrift's statement about Smith yelling to take sign off door on lie. It was off long before Bill Smith's death.

T.p. 791, L.7-12, Bobo's testimony and police interviews about "those drunks over there" shows Thrift's drunken states and behavior.

T.p. 580, L.13-20 Thrift testifies he was so drunk someone had to take him home.

T.p. 588 L.14-25 show Thrift's statement about Smith yelling at defendant to take sign down false.

T.p. 471, L.9-22 Bill Solberg's 2 police interviews bear out Barcella's contention he was in Retirement with Solberg in the early hours of 04-03-01. Thrift lied on

T.p. 561, p 566 L.1-8 that he was with Barcella when they walked to ~~the~~ 205 Indiana and Thrift

False and Perjured Testimony Ken Thrift

Thrifts room on 04-03-95 after coming home.
Defendant saw Solberg in Thrifts' room after
he was awakened ^{by} Ken Thrift to go to breakfast.
Tp. 605, 48-25 Thrift testifies Barcella had to
get rid of his dog or be evicted. Testimony
of Rikki Bobo shows this is a lie. Defendants
was told if he wanted to move from his original
end room ^{with Rikki Bobo} to the room he was in at the
time of Mr Smith's death he would have to get
rid of his dog. Defendant got rid of his dog
because he had limited resources and nowhere
to properly keep his dog.

Tp. 896, 418-p 897, 41-20 Testimony of Norm Bennett
refutes Thrift's testimony defendant yelled
"Fuck you" at Bill Smith. also Tp. 898, 419-p 902, 41-19
Tp 902, 420 Bennett either heard someone else
leave or is lying. Defendant didn't leave building
with Thrift till approximately 6:00 am.

T.p. 904 49-p 905, 41-3 Norman Bennett again
testifies he heard noone arguing with Smith
when they came in. Disputes Thrift's
testimony. At 1:00 am. Barcella was in Rath Room, anyway
Top. 897 421-p 898, 41-6 Bennett testifies he could
ot told Thrift he thought he heard him in
hallway on 04-03-95 - early ⁽¹⁶³⁾ morning hours.

False and Perjured Testimony Ken Thrift

Typ 594, L 1-24 Thrift has his facts wrong. He was drinking whiskey. Thrift told police in interviews.

Typ 594, L 25 - p 595, L 1-2 At trial Thrift says he was with defendant all night on 04-02-95 and continued into 04-03-95. In police interviews Thrift correctly states he was only with defendant after 4:30 a.m.

Typ 600, L 16 - p 620, L 1-20 Ken Thrift admits Rikki Bobo told him how Bill Smith was killed and she needed him to testify against Gerald Barcella or she would lose her son. Also see 2 Recorded Transcripts of Rikki Bobo/Ken Thrifts from hidden wire Bobo wore.

Typ 602, L 23 - p 603, L 1-6 Thrift told police "It's not for my sake, It's for Rikki" about him going to police with information against defendant. Rikki Bobo manipulated the mentally handicapped Thrift into testifying falsely.

Typ 604, L 4 - p 605, L 2 Thrift is again lying or incompetent to testify. He told police he saw another person in hallway

Typ 604 L 4 - p 605, L 1-2 more false testimony. Bill Solberg twice told police he was ⁽¹⁶²⁾asleep in Ken

False and Perjured Testimony Ken Thrift

T.p. 569, L 21-24 This testimony was not divulged by Thrift before trial. The defendant alleges the prosecution gave Thrift this information to bolster Thrift's testimony and credibility.

T.p. 570, L 1-15 Thrift could have gotten this information from Bennett, Bobo, Bakey or prosecutor.

T.p. 571 L 1-2 Thrift lies again. Defendant has not smoked cigarettes since 1989

T.p. 575, L 6-7 Bobo's testimony disputes Thrift's testimony

T.p. 576 L 12 Thrift's testimony defendant said "let's go hunting". Hunting season was not even open. another lie.

T.p. 579, L 15-20 Thrift admits Rikki Bobo talked him into testifying and telling police he saw Barcella coming out of Smith's room

T.p. 587, L 13 - p 588 L 1-10. Testimony of Bill Solberg disputes Thrift's testimony, (Police interviews)

T.p. 588, L 14-25 Another lie by Thrift. Rikki Bobo testified Gerry Barcella took the sign off his door two days before Smith's death. (16D)

False and Perjured Testimony Kenneth Thrift

Harmony House

T.p. 557, L 6-16 Prosecution used a photo line-up with a bright red circle around Barcella to help witnesses identify defendant

T.p. 559, L 3-11 Thrift lies he didn't know the police were police officers. Defendant was there and Thrift was yelling obscenities and calling them pigs. Thrift is a chronic liar.

T.p. 561, L 24-p 562, L 1-5 Thrift blatantly lies he left Watering Hole bar with Barcella.

Brad Bakley T.p. 945, L 17-p 946 L 1-17, Rikki Bobo

T.p. 691, L 6-p 692, L 1-5, Cpt Bergh T.p. 1535, L 15-p 1536
L 1-14 and two police interviews of Bill

Solberg show Thrift is lying T.p. 471, L 1-12.

T.p. 541-p 554 L 1-7 The prosecution withheld Ken Thrift's criminal record of 94 arrests and 42 felony convictions. Defense investigator Mark Durant went to California and dug up Thrift's records. Thrift lied on the stand to help Rikki Bobo and the prosecution supported Thrift's lies and encouraged them by taking no action and withholding evidence.

False and Perjured Testimony Ken Thrift

Trial p 471, L 1-17 Gerry Barcella and Bill Solberg arrived at Harmony House at approximately 3:20 a.m. on 04-03-95. This contradicts Thrift's false testimony

T.p 536, L 7-10 Barcella wished to question Thrift on his prior criminal record:

Containing 94 arrests and 42 felony convictions. Thrift lied under oath several times about his record.

Tp 945, L 17 - p 946 L 1-17 Brad Bakery's testimony Thrift lied about being with Barcella at Watering Hole bar and going to Harmony House with Barcella Also Rikki Bobo T.p. 770, L 2-10

Tp 1530 - p 1533, L 1-15 During testimony of Sargent Charles Fritz it is again shown that one of the state's witnesses most damaging to Gerry Barcella lied about being with Barcella after approximately 10:00 pm on 04-02-95 and early 04-03-95. Defendant was with Bill Solberg.

Tp 1535, L 15 - p 1536, L 1-14 Captain Berg's testifies Peter Cooper was called by Bill Smith at approximately 9:30 pm on 04-02-01 and Smith stated he put Thrift into bed after finding him passed out drunk in the ⁽¹⁵⁹⁾ Hallway at

False and Perjured Testimony
Kenneth Thirft

Prelim p 374 L 22-25 Thirft lies that police didn't threaten him before 08-95. See Thirft police interviews. Thirft also told defendant police threatened him and defendant saw and heard Detective Michael Wolf threaten to send Thirft to the penitentiary if Thirft didn't help them.

Prelim p 399 L 24-25 through p 401 L 1-14 Cpt Bugh testifies about ten Thirft taking a lie detector test. Thirft said he knew nothing of George Barcelona killing Bill Smith and "passed the test with flying colors."

Prelim p 433 L 25 - p 434 L 1-14 Detective Wolf testifies Thirft was so drunk on 04-03-95 Wolf couldn't

interview him.

Prelim p 481 L 5-9 The judge talks about credibility issues of state's witnesses and inconsistent testimony.

Trial p 414 L 20 - p 416 L 1-17 Norman Bennett had multiple contacts with Cpt Bugh about case and Bennett said he discussed case with Kenneth

Thirft including that Bennett thought that Thirft was with Barcelona at Harmony House

on 04-03-95 early in the morning 3:00 am - 4:30 am

False and Perjured Testimony Kenneth Thrift

Rikki Bobo and Brad Bahey all testified at trial Bill Solberg was at the watering hole bar with Gerry Barcella. Also police reports of Bill Solberg interviews, and interviews of Bobo, Bahey and Smeltzer.

Prelim p. 366 L3-16 Thrift says he left The Watering Hole with Barcella. False testimony. Barcella left with Solberg, see testimony of Brad Bahey T.p. 944, L17-p 946, L1-8 and Rikki Bobo testimony prelim p 256, L2-24 p 331 and police interviews of both and police interviews of Bill Solberg.

Prelim p 372 L11-14 Thrift testifies he was with defendant and Solberg was not home in Thrift's apartment the night of 04-02-01/04/03/01

Testimony and police reports of Brad Bahey, Rikki Bobo, Bill Solberg and Peter Cooper show

Thrift is lying. See police interviews of Bill Solberg and T.p. 471, 19-20

Prelim p 373 L1-17 Thrift changes his testimony that Bill Solberg was at The Watering Hole bar. Shows Thrift is easily led to lie.

Prelim p. 374, L 13-21 Thrift testifies police threatened to send him to the penitentiary if he didn't co-operate and testify against

Gerry Barcella and that Thrift was scared 288

False and Perjured Testimony Kenneth Thrift

Prelim p. 358, L 21 - p 359, L 1-10 Thrift passed a lie detector test he knew nothing about Barcella killing Bill Smith.

Prelim p. 360, L 21-25 Thrift again lies that he only drinks beer, not whiskey or hard liquor. See testimony of Peter Cooper, Rikki Bobo and police interviews of Thrift and Bobo. The defendant has seen Thrift drinking hard liquor and severely intoxicated from such several times.

Prelim p. 364, L 17 - p 365, L 1-14 Thrift lies that he was with defendant from 10:00 am on 04-02-95 till 04-03-95 9:00 am. Defendant denies this. See testimony of Peter Cooper p 1535, L 15 - p 1536, L 1-14, testimony of Brad Bahey T.p. 944, L 17 - p 946, L 1-8 and police reports and interviews of Bill Solberg and Cpt Bergh. also Rikki Bobo prelim p. 331, L 10-20, prelim p. 256

Prelim p. 352, L 4-11 Thrift admits heavy alcohol use the weekend of Bill Smith's death.

Prelim p. 349, L 14-21 and prelim p. 352, L 12-17 Two contradictory statements on whether Thrift told police about Gerry Barcella allegedly confessing crime.

Prelim p. 365, L 18 - p 366, L 1-2 Thrift testifies Bill Solberg was not at The Watering Hole bar the night Bill Smith was killed. While Smeltzer

False and Perjured Testimony

Kenneth Thrift

Bennett heard Thrift at 1:00 am. Police Report

Prelim p 324, L 12 - p 325, L 1-25 Bobo talks about Police threats to take her child if she didn't cooperate with them. She relayed this to Thrift when she asked him to testify against Barcella. See 2 recorded conversations between Bobo and Thrift.

Prelim p 326 L 20-26 Bobo testifies she worked at Sears. Thrift met her here often to discuss case before and after her arrest on 08-15-95.

Prelim p 353, L 15, 16 Thrift lies he has only two (2) criminal convictions. Prosecution didn't attempt to correct this lie.

Prelim p 353 L 17-20 Thrift was facing ten years for two felony drunk driving arrests, one year for open container and was eligible for life sentence under habitual offender law due to 94 arrests and at least 42 felony convictions. Thrift got a "rider" of 3 or 6 months and suspended prison sentence.

Prelim p 355, L 7-10 Thrift admits he only went to Police after Bobo talked him into it.

Prelim p 357 L 7-12 Thrift lies he only talked to Bobo 2 times about Bill Smith's death. He talked to Bobo several times at Harmony House and at Sears where Bobo worked. See trial discovery.

False and Perjured Testimony Kenneth Thrift

Prelim p. 72, L 17-25 Police interview in which George Christman states Bill Smith had been having a lot of arguments and problems with Kenneth Thrift. The prosecution perversely put this on Barcella to go to motive.

Prelim p. 238, L 14-25 Testimony of Norman Bennett contests Ken Thrift's testimony that Barcella yelled "Fuck You" to Bill Smith.

Prelim p 231 - p 232 L 1-13 Conflicts with testimony of Thrift that Barcella was hostile towards Smith.

Prelim p 226, L 7-21 and prelim p 229 Norman Bennett got information on the case from police and talked to Kenneth Thrift about the case.

Prelim p 246, L 1-16 Bennett told Thrift he thought he recognised Thrift's voice as one of two drunks when the one with Thrift fell over the potted plant in hallway. This is where Thrift got this information. William Solberg in two police interviews says he was with Barcella when Barcella tripped over plant. Thrift was not with defendant. See testimony of

Peter Cooper T.p. 1535 L. 15 - p 1536, L 1-14, testimony of Brad Bakey T.p. 944, L 17 - p 946, L 18, testimony of Rikki Bobo

Prelim p. 256, L 2-24 and Rikki Bobo, prelim p 331, L 10-20
T.p. 691 & 6 - p 692, L 15 and ⁽¹⁵⁴⁾ Police reports of Cpt Charles Bergh.

False and perjured Testimony Kenneth Thrift

of her son after she lied to Thrift and manipulated him to testify so she could herself get out of trouble on other felony charges. Thrift didn't go to police until Bobo asked him to.

The prosecution heard Thrift lie on the stand and did nothing about it. Prosecutors withheld Kenneth Thrift's criminal record from Barcella's attorneys.

The jury found Barcella guilty of murder in the first degree through the false and perjured testimony of Kenneth Thrift singularly or cumulatively with other violations of the U.S. Constitution. Thrift's perjured and false testimony denied Barcella his rights to confront witnesses, rights to due process, rights to effective assistance of counsel and violated the 5th, 6th, 8th and 14th amendments to the U.S. Constitution and Idaho Constitution and any similar or expanded rights and violated Bern V Barcella's 8th amendment rights to be free from cruel and unusual punishment from an unfair process.

TAKE JUDICIAL NOTICE OF UNDERLYING CRIMINAL FILE
INCLUDING TRANSCRIPTS, 153

False and Perjured Testimony Kenneth Thrift

Convictions.

Thrift's testimony throughout Barcella's preliminary hearing and trial are rife with perjury and lies. The testimony of Brad Bahey, Rikki Bobo, Peter Cooper and police interviews of Bill Solberg show Thrift's testimony to be false.

Ken Thrift was the person who Bill Smith told people he was scared of and was going to evict. Not Barcella. Barcella heard and/or saw Thrift yelling at Smith and viceversa several times as had George Christman and others.

Thrift, Bahey and Bennett all moved near Bonner's Ferry and Sandpoint and kept in touch between 04-02-95 and Barcella's trial. Thrift and Bobo also kept in touch and swapped information.

The police threatened to send Thrift to prison if he didn't cooperate with them.

The testimonies of Thrift, Bobo, Bahey and Bennett were all more consistent at trial, than in police interviews or at preliminary hearings. Thrift told police he was co-operating to help Rikki Bobo ~~(keeper)~~ ⁽⁵²⁾ from losing custody 29:

The Jury Found The Defendant GUILTY OF MURDER I Through The False and Perjured Testimony of Kenneth Thrift

The testimony of Kenneth Wayne Thrift against Gerald Barcella is a disgraceful affront to justice.

Police, Prosecutors and Rikki Bobo engaged in dispicable unethical acts of manipulating a mentally handicapped person and solicited blatantly false and perjured testimony from Kenneth Thrift to convict Gerald Barcella. Thrift himself was a suspect and Detective Wolf and Sgt Charles Fritz had tried to get Gerald Barcella to give them information on Thrift allegedly killing Smith around 04-05-95.

Ken Thrift was so drunk the week of Bill Smith's death he didn't remember who he was with, where or when. Through Norman Bennett, Brad Bakey and Rikki Bobo Thrift pieced together his testimony.

Ken Thrift was facing ten years in prison himself and the possibility of life w/o parole for habitual offender yet received a 3 or 6 month "order" despite 94 arrests and 42 felony

The Jury Found Mr. Barcella Guilty through the cumulative effect of false and perjured testimony, singular effect of perjured testimony, alone or in conjunction with other trial errors.

Take judicial notice of underlying criminal file including transcripts.

Judge Haman's Bad Conduct

this petition. The prosecution illegally planted professional snitch Kenneth Dawson to secure testimony against Barcella. Dawson stated 4 murder I defendants in Kootenai County jail confessed to him when he was moved from pod to pod by jail officials in a 72 hour period.

Jailhouse snitch Robert Agritolio was moved from a different pod in jail to pod or cellblock Barcella was in to snitch on Barcella I.p. 1393, 213 - p 1394 21-19 which is illegal.

Judge Haman told Barcella at pretrial motions of 6 the record he would see Barcella dead.

Haman had previously wrongly sentenced defendants ~~and~~ Gibson and Paradise to death. Paradise went home and Gibson will go home shortly.

Judge Haman's Bad Conduct

Tip. See Agrifoglio. ~~April~~ p. 93, L3-4, p. 103-108

Judge Haman's refusal to exclude prior bad acts of Barcella resulted in the prosecution's use of an undisclosed blown-up 9x12" booking photo of Barcella holding a booking number sign from a case that was dismissed against Barcella. Tip 482, L24-p 483, L1-11

Judge Haman's denial of motion to disclose witness backgrounds Pretrial p. 63, L25-p. 70, L1-22 allowed prosecutors to hide the criminal records of Kenneth Wayne Thrift and George Lane.

Judge Haman's refusal to disclose psychological records of Kenneth Wayne Thrift resulted in a witness against Barcella who is mentally disabled and unfit to testify. Pretrial p. 15, L17-p. 19, L1-24. Thrift is retarded and severely alcoholic.

Judge Haman denied Barcella's motion to exclude Jailhouse snitch testimony. Pretrial p. 55 L19-p. 57, L1-17 allowed prosecution to plant snitches on Barcella and obtain fraudulent testimony of Robert Agrifoglio and George Lane.

See Keaton: city letter #8 (08-30-97) p. 297 of 148

Judge Haman's Bad Conduct

Chances for a fair trial were ruined from the start. Prosecutor Haynes solicited testimony from Virginia Wyline Smeltzer that Mr. Barcella had a large knife on his belt the night of Bill Smith's death. T.p. 499, L 17-18. Det. Wolf testified about a hatchet allegedly owned by Mr. Barcella T.p. 1110, L 20-p. 1113, L 1-4. George Lane told the jury Mr. Barcella had gotten away with two prior shootings (murders) T.p. 1184, L 24-p. 1185, L 1-2. Also see T.p. 1861, L 8-p. 1870, L 1-25, and T.p. 1195, L 10-p. 1196, L 1-8, which talk about disclosure of Barcella's prior bad acts. Judge Haman's decision opened the door to prior bad acts.

Judge Haman denied Mr. Barcella's request to disclose witness backgrounds pretrial p. 63, L 25-p. 70, L 1-22. This allowed Prosecutor Lansing Haynes to suborn false and perjured testimony by three state's witnesses concerning their criminal records and allowed Haynes to play dumb at their testimony. See testimony of Kenneth Wayne Thrift T.p. 536, L 7-10, prelim p. 353, L 15, 16, prelim p. 353, L 17-20, T.p. 541, L 1-p. 554, L 1-7

Robert Agnifolico lied about his record. T.p. 1376, 1377. George Lane lied about his record 298

Judge Haman's decisions and Conduct before trial and during Pretrial motions Hearings were so bad as to deprive Gerald Barcella of a fair trial and to get him found guilty of murder in violation of his 5th, 6th, 8th and 14th Amendment to the U.S. Constitution rights and Idaho Constitutional rights and similar rights to due process, effective assistance of counsel, right to confront witnesses and to be free from cruel and unusual punishment begotten from an unfair process.

TAKE JUDICIAL NOTICE OF UNDERLYING CRIMINAL FILE INCLUDING TRANSCRIPTS

Judge Haman's denial at Pretrial motions hearing of Mr Barcella's motion to exclude prior bad acts of Mr Barcella Pretrial motions transcript page 35 21 - p 37, 21-16 allowed Prosecutor Lansing Haynes in Opening Statement T.p. 261 218 - p. 262, 21-11 to tell the jury Mr Barcella had a duffel bag containing a sawed-off shotgun and a hatchet and a large knife at a bar the night of Bill Smith's death and was told to leave the bar. These prior bad acts are highly prejudicial, non-probative and false. Mr Barcella's

Judges bad conduct / decisions.

Judge Bengsten harrassed expert witness Danny Smith P.H.D. and wrongly limited his presentation. T.p. 1505, L1 - p 1521, L1.
T.p. 1519, L21 - p 1520, L1-2

Judge Bengsten acted like a spoiled child lying about testimony and twisting and denying case law in his denial of Barcellos motion for new trial / Acquittal. T.p. 1801 - p. 1871

Bengsten even lied Barcellos witnesses didnt identify at trial T.p. 1847, L 18-22

Judge Bengsten shouldnt be allowed to hear traffic cases.

Wrongful decisions of Judge

Trial Judge should have further
voir dired the jury pool concerning highly
prejudicial comments made by prospective
juror William Tamesonic concerning people
charged with murder, their guilt and their
receiving little or no punishment. TP 91, L 23 -
p. 92, L 1-17

Manifestly Inconsistent Decisions

Judge Bengsten repeatedly sequestered jurors when prosecutors raised an objection but would not do so for the defense and at least twice allowed jurors to hear testimony that had to be stricken. Curative jury instructions can not "upring the bell" once it is rung. During testimony of Wythe Smeltzer T.p. 499, L 17 - p. 500, L 1-7 and during testimony of Det. Wolf T.p. 1109 - p 1113, L 1-20

Judge Bengsten should have recused himself from Barcella's trial due to a conflict of interest as prosecutor Joel Hazel had worked as Bengsten's law clerk and Bengsten was biased toward prosecutors and against the defense T.p. 320, L 2-3

Judge Bengsten should have declared a mistrial immediately after Det. Wolf's highly prejudicial, non probative testimony, disclosure of information not in evidence, and undisclosed evidence suggesting as Judge Bengsten said suggests Barcella is some sort of axe-murderer. T.p. 1109 - p 1113, L 1-20 About Barcella's ^{alleged} ownership of an undisclosed hatchet that was in the courtroom T.p. 1109; L 15 - p 1111, L 4

Judge Bengsten should have declared a mistrial due to the exhorbant amount of perjury committed by the States witnesses and suborned by Prosecutors. See False And Perjured Testimony of the following witnesses in this petition.

Rikki Bobo, Virginia Wyline Smeltzer, Brad Bakke, Robert Agri. Folio, Kenneth Wayne Thrift, Norman Bennett, Off Christine Wood, Peter Cooper, George Lane, Off John Kelly.

Judges Bad Conduct/Decisions

T.p. 1801, - p 1867 Judge Bengsten denied defendants motion for mistrial or Acquittal despite being shown several unethical, wrong, unprofessional and illegal acts of the prosecution and himself

Ip 1660, 218 - p 1661, 21-10 Judge sees there is a pattern of prosecutor Haynes threatening witnesses. Haynes threatened Robert Aguilino to testify.

Judge's Bad Conduct/Decisions

Tp 1652, L23 - p 1653, L1-14 Atty Graham testifies prosecutor Haynes apologised to her for his strong-arm tactics.

T p. 1654, L3 - p. 1655, L1-21 Judge Bengsten tells attorney Graham she couldn't tell the jury her client had been threatened to testify or felt threatened to testify. This is in conflict with what he said on T. p 1642, L23 - p 1643, L1

Tp 1655, L15-21 Atty Graham testifies she told George Lane if he didn't testify he would be held in contempt of court and flop his rider and be sent to the penitentiary with the defendant.

Tp 1656, L13 - p 1657, L1-11 Atty Graham testifies George Lane decided to testify because he felt threatened and was threatened through her to testify by Prosecutor Haynes. Lane was scared of being flopped on his rider and sent to prison for a very, very long time with defendant.

Top 1700, L7 - p 1717, L1-12 Judge Bengsten denied defendant's jury verdict form and provided faulty jury instructions ~~through~~ ^{of} her prosecution to jury. Prosecutors form which was asked by Bengsten doesn't allow jurors to clearly and unequivocally find the defendant guilty of second degree murder. Defendant was prejudiced by a first degree murder conviction.

Judge's Bad Conduct/Decisions

The disallowed testimony would have discredited the prosecution's witnesses

Judge Bengsten's decision to not allow testimony of George Lane and his two attorneys that Lane was threatened into testifying against Gerald Barcella was so prejudicial as to give defendant an unfair trial. The defendant was deprived of his 5th, 6th, 8th and 14th amendment to the US constitution rights and rights under Idaho law to be free from cruel and unusual punishment from an unfair trial, right to effective assistance of counsel and right to confront and cross-examine witnesses

Tp 1635, 221 - p 1636, 21-22 testimony of George Lane that his attorney Suzanne Graham relayed a message to him from Prosecutor Lansing Haynes.

Tp 1648, 23-13 Attorney Suzanne Graham testifies George Lane was scared he had to testify or flop his "rider" and be sent to prison

Tp 1642 - p 1643, 21 Judge Bengsten notes "there certainly is an issue here, but later doesn't allow testimony in."

Tp 1650 - 1651, 21 Again Atty Graham again testifies Prosecutor Haynes threatened her client.

Tp 1652, 23-5 Atty Graham testifies she told Prosecutor Haynes she wouldn't put up with his strong-arm tactics.

Judge's Bad Conduct/Decisions

The state's entire case against Barcella was snitch testimony.

T.p. 1590 - p 1603, L1-22 Judge Bengsten wouldn't allow defense witness Bryon Ames to testify in front of jury. George Lane told him the prosecution threatened Lane to testify.

T.p. 1561, L25 - p 1562, L1-15 Judge Bengsten denied defendant his sixth amendment right to confront witness and effective assistance of counsel when Bengsten ruled Barcella could not cross-examine or impeach witness on evidence the state

presented to jury through mouth of a witness.

T.p. 1361 - p 1425, L1-21 Judge Bengsten allowed Cpt. Charles Bergh to read the preliminary hearing testimony of Robert Agrifolio to the jury. Cpt Bergh presented a much different and more honorable persona than Agrifolio, a state convict doing a ten to twenty year sentence. Agrifolio is slovenly, appears deceiving and has long unkempt hair. Agrifolio's testimony was bolstered by Cpt. Bergh pretending to be Agrifolio on the stand.

T.p. 1162, - p 1163, L1-4 Again defense had trouble getting test results, case evidence and having witness available to defense attorneys.

T.p. 1630, 276 - p 1663, L1-22 Includes the testimony of George Lane. Atty Glen Walker and Atty Suzanna Graham.

Judge's Bad Conduct/Decisions

unavailability of state's witnesses to defense to interview and/or cross-examine, repeated prior bad acts being solicited by prosecution made for an unfair trial. Judge should have declared a mistrial

Tr. 1431, L20 - p 1432, L1-4 Undisclosed 27 pages of police interview transcripts of Rikki Bobo made Atty Adams look unprepared to jury and prejudiced defendant

Tr. 1432 - p 1433 Judge Bengsten wrongfully denied defense motion for mistrial or acquittal.

Tr 1481, L6-7 Judge Bengsten acknowledged the sequestered jury can hear witness testimony.

Tr 1485, L2-4 Another admonition by Judge Bengsten to witness to lower his voice as jurors sequestered in jury room could hear him

Tr. 1519, L15 - p 1520, L1-24 Judge Bengsten severely limited testimony of expert witness for defense Dr. Danny Smith a correctional expert. Judge would not allow defense to ask Dr Smith "Have you ever met a snitch that testified for free, or does every single one of them want something in exchange"? Judge wouldn't allow the question yet said we could allude it in closing. This would greatly diminish the statement as it would come from defense attorney, not expert witness.

Judge's Bad Conduct/Decisions

T.p. 1203, L9-16 Judge Bengsten should not allowed testimony of George Lane as he was made unavailable to the defense for interview

T.p. 1214, - p. 1219, L1-25 Judge allowed police officers to testify to alleged ownership of hatchet by defendant, opening statement of prosecutor Haynes defendant had a sawed off shotgun, hatchet and large knife with him earlier in the night of Bill Smith's death and George Lane's testimony defendant had shot (killed) two other people and had gotten away with it. Bengsten wrongfully decided Atty Adams had "opened the door" to prior bad acts in his opening statement by saying the jury would hear Barcella was arrested another time for illegal possession of a firearm. Curative jury instruction cannot unring bell. Bengsten should have declared a mistrial or a verdict.

T.p. 1372, L3-16 Judge Bengsten allowed in testimony of Agrifolio that he was scared of defendant to be read to the jury. Agrifolio refused to testify and the jury could assume because he was scared to.

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T.p. 1429 - p. 1431 L1-25 The cumulative effect of prior bad acts, perjured testimony, repeatedly withheld evidence,

Judges Bad Conduct/Decisions

The sign on Barcella's door was directed at Brad Bahey and Ronnie his homosexual lover. Bahey lived next door and Ronnie in the end apartment in Harmony House.

Tr. 1095, 214 - p 1105, 21-24 Judge Bengsten would not allow defendant to put on a character defense without opening the door to all prior bad acts, arrests and convictions from any date whether felonies, misdemeanors including convictions over ten years old thereby cutting the heart out of defense that was going to be put on by Barcella. Our eleven witnesses Barcella wanted to put on the stand could not be called.

Yet Bengsten would not allow defense to question any state witnesses on convictions over ten years old or crimes that did not involve moral turpitude. This action was highly prejudicial to defendant.

Tr 1200 421 - p 1201, 21-25 Judge Bengsten should have declared a mistrial due to cumulative effect of prior bad acts of defendant proffered by state witnesses. Repeated testimony that defendant carried a skewed-off shotgun, hatchet and large knife the night of Bill Smith's death was highly prejudicial and served no other purpose 31C

Judge Bad Conduct/Decisions

Trp 998, 48 - p 999, 41 Judge asks if we would like a mistrial. Prosecution objects. Judge should have declared a mistrial.

Trp 939, 49-20 During questioning of state's witness by Atty John Adams Judge Bengsten abruptly yelled at Adams that he couldn't continue questioning of Bakey's homosexuality that Adams lost train of thought and failed to ask for voir dire outside of presence of jury to lay foundation as to why the question was asked and so defense could impeach Bakey due to fact defendant knocked out Bakey's homosexual lover the week prior to Bill Smith's death and Barcella was accused of firing a 22 rifle into ceiling/upper wall area and yelling at Bakey and Ken Thrift in Thrift's apartment at 2:00 am on April 1, 1995 to "keep it down" after defendant and Rikki Bobo were reportedly awakened by Thrift rebuffing Bakey's sexual advances and sexual assaults.

Bakey's testimony against defendant was substantial in that Bakey said defendant told him ten times he was going to kill 311 Smith. Defendant vehemently denies this.

Judges Bad Conduct/Decisions

TP 617, L 14-22 Judge allows prosecutor to get in front of jury statement that defendant lost 125 lb and cut his hair to deceive state's witnesses and the jury.

TP 618, L 5-9 Plaintiff's exhibit #21 ^{photo} showing a red circle around defendant in lineup is unethical.

TP 619, L 25 - p 620 L 1-6 Witness was in progress of answering in the negative and after interruption by Judge Bengsten answered in the affirmative.

TP 812, L 21 - p 821, L 1 Judge Bengsten allows state's witness Rikki Bobo to testify to defendant's state of mind.

TP 717, L 3 - p 724, L 1-4 Judge wouldn't allow defendant to tell jury or solicit information Rikki Bobo had asked for help on her current charges in addition to a self-recognition bond.

Top. 961, L 4-6 County desperately wanted Judge Bengsten to immediately preside over trial. A trial be immediately before the Christmas holiday would be prone to decided quickly by a jury and prone to conviction rather than acquittal to be done with and get on with holiday events, etc. Judge Bengsten is also very well known for violating defendants rights to obtain convictions and to err on the side of the prosecution.

Judges Bad Conduct/Decisions

T.p. 493 - p 495, L 1-14 Judge Bengsten allowed Prosecutor to get in "through the backdoor" suborned perjury of Virginia Wylene Smeltzer that Bill Smith was scared of Gerald Barcella although Smeltzer testified Smith never used Barcella's name T.p. 484, L 2 - p 496, L 1-3 and was caught lying as to such and despite police interview of George Christman (prelim p 721, L 17 - p 731, L 1-11) that Ken Thrift was often seen at Bill Smith's door arguing and it was Thrift Smith was scared of, and testimony of Rikki Bobo T.p. 800 L 14 - p 801, L 10 that she was with defendant when he found "note from Bill" and wasn't upset as T.p. 804, L 16 - p 805, L 1-3 where Bobo testified Peter Cooper was trying to rent her and Barcella a bigger apartment after Bill Smith's death. If Smith had been scared of Barcella Cooper would have known.

Decisions

Judges Conduct was so bad as to deprive the defendant of a fair trial

Tr. p 23 p 24, 41 Sequestered jury can hear arguments and testimony. They are not supposed to hear. Judge Bengsten should have moved trial.

Tr. p 34, 410-17 jurors can overhear prosecutors as prosecution's table was only five feet from jury box. Judge Bengsten should have moved trial.

Tr. p 482, 224 - p 483, 21-11, undisclosed booking photo of defendant from a dismissed case and a photo line-up that was undisclosed allowed into evidence.

Tr. p 482, 224 - p 483, 21-11, Booking photo was highly prejudicial and showed prior bad acts.

Tr. p 492 - p 500, 27 Testimony of Wylene Smeltzer contains prior bad acts, is highly prejudicial and obviously false.

Tr. p 557, 26-16 Judge Bengsten allowed in an undisclosed line-up photo in which defendant had a large red circle drawn around him.

Tr. p 606, 49-18 Judge wouldn't allow defense to inquire into Kenneth Thrift's mental disabilities.

Tr. p 617, 215-22, Judge lets in testimony defendant was a large Biker type individual with a scruffy beard. This was highly prejudicial and had no other reason.

Judge's misconduct

Trp. 322, L10-16 Judge Bengsten concedes that after the jury heard highly prejudicial false testimony of Officer Kelly asserting defendant had prior knowledge of crime the defense could have asked for a mistrial instead of merely having the testimony stricken. Bengsten says "the Bell can not be unrung", yet later on after this and numerous accounts of defendant's prior bad acts and George Lane's testimony Barcella had shot two other people and had gotten away with it he won't give an acquittal or declare a mistrial despite pleas from defense attorneys and motion for mistrial/Acquittal.

Trp 1432, L19 - p 1433 L3 the Court acknowledged Barcella's function rested upon the credibility of witnesses yet wouldn't allow Barcella to impeach witnesses Bobo, Thrift, Agostolico or Bakey

William Smith's best friend, surrogate son and employer Robert Healey told Barcella after trial: "I don't know if you killed him or not, but you sure got screwed"

Judge Bengsten's decisions at trial were manifestly inconsistent and unfair. Twice during early stages of trial Judge Bengsten suggested or offered a mistrial due to trial errors T.p. 322, L. 10-16

T.p. 998, L. 9-20

Later, after many more errors at trial of which the cumulative effect was overwhelming, Judge Bengsten denied the defendants request for a mistrial as the state was clearly winning the trial due to those errors. T.p. 1203, L. 9-16, T.p. 1214, -p. 1219, L. 1-25

See perjured and false testimony of Rikki Bobo, Virginia Wylene Smeltzer, Ken Thrift and others in this petition and also all trial errors listed in this petition including prior bad acts and information not in evidence in opening T.p. 261 L. 18-262
and T.p. 499, L. 17-18 by Virginia Wylene Smeltzer
T.p. 493, p. 495 L. 1-34 Smeltzer, Kenneth Wayne Thrift T.p. 564, L. 6-16, George Lane
T.p. 1184 L. 21-p. 1185, L. 1-4 Det Wolf T.p. 1109, -
p. 1113, L. 1-20

Judge Bengsten should have moved the trial. Jurors could hear testimony while sequestered and could hear prosecutors talkers at their table.

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The Judge's Decisions and conduct at trial were so bad as to deprive defendant of a fair trial, in violation of U.S. Constitutional Amendments 5, 6, 8 and 14 and Idaho Constitution

Judge Bengsten's wrongful decisions and wrongful conduct deprived Barcella his right to confront witnesses, effective assistance of counsel, due process, access to witnesses, right to confront witnesses and right to be free from cruel and unusual punishment from an unfair process.

Judge Bengsten oversaw, condoned and encouraged unethical and illegal conduct of prosecutors, (threatening witnesses, subornation of perjury) allowed in prior bad acts of defendant, allowed in prohibited hearsay testimony and fostered an atmosphere unfair to the defendant and allowed prosecutors to perpetuate a fraud upon the court against the interests of justice.

TAKE JUDICIAL NOTICE OF UNDERLYING CRIMINAL FILE
INCLUDING TRANSCRIPTS

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statements by a lawyer can unfairly undermine public confidence in the administration of justice.

When a lawyer seeks judicial office, the lawyer should be bound by applicable limitations on political activity.

To maintain the fair and independent administration of justice, lawyers are encouraged to continue traditional efforts to defend judges and courts unjustly criticized.

Rule 8.3 - Reporting Professional Misconduct

- (a) A lawyer having knowledge that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.
- (b) A lawyer having knowledge that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall inform the appropriate authority.
- (c) This office does not require disclosure of information otherwise protected by Rule 1.6.

COMMENT:

Self-regulation of the legal profession requires that members of the profession initiate disciplinary investigation when they know of a violation of the Rules of Professional Conduct. Lawyers have a similar obligation with respect to judicial misconduct. An apparently isolated violation may indicate a pattern of misconduct that only a disciplinary investigation can uncover. Reporting a violation is especially important where the victim is unlikely to discover the offense.

A report about misconduct is not required where it would involve violation of Rule 1.6. However, a lawyer should encourage a client to consent to disclosure where prosecution would not substantially prejudice the client's interests.

If a lawyer were obliged to report every violation of the Rules, the failure to report any violation would itself be a professional offense. Such a requirement existed in many jurisdictions but proved to be unenforceable. This Rule limits the reporting obligation to those offenses that a self-regulating profession must vigorously endeavor to prevent. A measure of judgment is, therefore, required in complying with the provisions of this Rule. The term "substantial" refers to the seriousness of the possible offense and not the quantum of evidence of which the lawyer is aware. A report should be made to the bar disciplinary agency unless some other agency, such as a peer review agency, is more appropriate in the circumstances. Similar considerations apply to the reporting of judicial misconduct.

The duty to report professional misconduct does not apply to a lawyer retained to represent a lawyer whose professional conduct is in question. Such a situation is governed by the rules applicable to the client-lawyer relationship.

Rule 8.4 - Misconduct

It is professional misconduct for a lawyer to:

- (a) violate or attempt to violate the rules of professional conduct, knowingly assist or induce another to do so, or do so through the acts of another;
- (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;
- (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
- (d) engage in conduct that is prejudicial to the administration of justice;
- (e) state or imply an ability to influence improperly a government agency or official; or
- (f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.

COMMENT:

Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. However, some kinds of offense carry no such implication. Traditionally, the distinction was drawn in terms of offenses involving "moral turpitude." That concept can be construed to include offenses concerning some matters of personal morality, such as the adultery and comparable offenses, that have no specific connection to fitness for the practice of law. Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty, or breach of trust, or serious interference with the administration of justice are in that category. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation.

A lawyer may refuse to comply with an obligation imposed by law upon a good faith belief that no valid obligation exists. The provisions of Rule 1.2(d) concerning a good faith challenge to the validity, scope, meaning or application of the law apply to challenges of legal regulation of the practice of law.

Lawyers holding public office assume legal responsibilities going beyond those of other citizens. A lawyer's abuse of public office can suggest an inability to fulfill the professional role of attorney. The same is true of abuse of positions of private trust such as trustee, executor, administrator, guardian, agent and officer, director or manager of a corporation or other organization.

Rule 8.5 - Jurisdiction

A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction although engaged in practice elsewhere. A lawyer admitted to practice in other jurisdictions is subject to the Rules of Professional Conduct as adopted in this state, and may be subject of appropriate enforcement proceedings in this state, with respect to any practice of law conducted in this state.

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formulate issues and advance argument in the matters under consideration. The decision-making body, like a court, should be able to rely on the integrity of the submissions made to it. A lawyer appearing before such body should deal with the tribunal honestly and in conformity with applicable rules of procedure.

Lawyers have no exclusive right to appear before nonadjudicative bodies, as they do before a court. The requirements of this Rule therefore may subject lawyers to regulations inapplicable to advocates who are not lawyers. However, legislatures and administrative agencies have a right to expect lawyers to deal with them as they deal with courts.

This Rule does not apply to representation of a client in a negotiation or other bilateral transaction with a governmental agency; representation in such a transaction is governed by Rules 4.1 through 4.4.

Transactions With Persons Other Than Clients

Rule 4.1- Truthfulness in Statements to Others

In the course of representing a client a lawyer shall not knowingly:

- (a) make a false statement of material fact or law to a third person; or
- (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

COMMENT:

Misrepresentation

A lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts. A misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false. Misrepresentations can also occur by failure to act.

Statements of Fact

This Rule refers to statements of fact. Whether a particular statement should be regarded as one of fact can depend on the circumstances. Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are in this category, and so is the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud.

Fraud by Client

Paragraph (b) recognizes that substantive law may require a lawyer to disclose certain information to avoid being deemed to have assisted the client's crime or fraud. The requirement of disclosure created by this paragraph is, however, subject to the obligations created by Rule 1.6.

Rule 4.2 - Communication with Person Represented by Counsel

In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

COMMENT:

This Rule does not prohibit communication with a party, or an employee or agent of a party, concerning matters outside the representation. For example, the existence of a controversy between a government agency and a private party, or between two organizations, does not prohibit a lawyer for either from communicating with nonlawyer representatives of the other regarding a separate matter. Also, parties to a matter may communicate directly with each other and a lawyer having independent justification for communicating with the other party is permitted to do so. Communications authorized by law include, for example, the right of a party to a controversy with a government agency to speak with government officials about the matter.

In the case of an organization, this Rule prohibits communications by a lawyer for one party concerning the matter in representation with persons having a managerial responsibility on behalf of the organization, and with any other person whose act or omission in connection with that matter may be imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization. If an agent or employee of the organization is represented in the matter by his or her own counsel, the consent by that counsel to a communication will be sufficient for purposes of this Rule. Compare Rule 3.4(f).

This rule also covers any person, whether or not a party to a formal proceeding, who is represented by counsel concerning the matter in question.

Rule 4.3 - Dealing with Unrepresented Person

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.

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called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9.

COMMENT:

Combining the roles of advocate and witness can prejudice the opposing party and can involve a conflict of interest between the lawyer and the client.

The opposing party has proper objection where the combination of roles may prejudice that party's rights in the litigation. A witness is required to testify on the basis of personal knowledge, while an advocate is expected to explain and comment on evidence given by others. It may not be clear whether a statement by an advocate-witness should be taken as proof or as an analysis of the proof.

Paragraph (a)(1) recognizes that if the testimony will be uncontested, the ambiguities in the dual role are purely theoretical. Paragraph (a)(2) recognizes that where the testimony concerns the extent and value of legal services rendered in the action in which the testimony is offered, permitting the lawyers to testify avoids the need for a second trial with new counsel to resolve that issue. Moreover, in such a situation the judge has first-hand knowledge of the matter in issue; hence, there is less dependence on the adversary process to test the credibility of the testimony.

Apart from these two exceptions, paragraph (a)(3) recognizes that a balancing is required between the interests of the client and those of the opposing party. Whether the opposing party is likely to suffer prejudice depends on the nature of the case, the importance and probable tenor of the lawyer's testimony will conflict with that of other witnesses. Even if there is risk of such prejudice, in determining whether the lawyer should be disqualified due regard must be given to the effect of disqualification on the lawyer's client. It is relevant that one or both parties could reasonably foresee that the lawyer would probably be a witness. The principles of imputed disqualification stated in Rule 1.10 has no application in this aspect of the problem.

Whether the combination of roles involves an improper conflict of interest with respect to the client is determined by Rule 1.7 or 1.9. For example, if there is likely to be substantial conflict between the testimony of the client and that of the lawyer or a member of the lawyer's firm, the representation is improper. The problem can arise whether the lawyer is called as a witness on behalf of the client or is called by the opposing party. Determining whether or not such a conflict exists is primarily the responsibility of the lawyer involved. See Comment to Rule 1.7. If a lawyer who is a member of a firm may not act as both advocate and witness by reason of conflict of interest, Rule 1.10 disqualifies the firm also.

Rule 3.8 - Special Responsibilities of a Prosecutor

The prosecutor in a criminal case shall:

- (a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;
- (b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;

- (c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;
- (d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal; and
- (e) exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6.

COMMENT:

A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence. Precisely how far the prosecutor is required to go in this direction is a matter of debate and varies in different jurisdictions. Many jurisdictions have adopted the ABA Standards of Criminal Justice Relating to Prosecution Function, which in turn are the product of prolonged and careful deliberation by lawyers experienced in both criminal prosecution and defense. See also Rule 3.3(d), governing ex parte proceedings, among which grand jury proceedings are included. Applicable law may require other measures by the prosecutor and knowing disregard of those obligations or a systematic abuse of prosecutorial discretion could constitute a violation of Rule 8.4.

Paragraph (c) does not apply to an accused appearing pro se with the approval of the tribunal. Nor does it forbid the lawful questioning of a suspect who has knowingly waived the rights to counsel and silence.

The exception in paragraph (d) recognizes that a prosecutor may seek an appropriate protective order from the tribunal if disclosure of information to the defense could result in substantial harm to an individual or to the public interest.

Rule 3.9 - Advocate in Nonadjudicative Proceedings

A lawyer representing a client before a legislative or administrative tribunal in a nonadjudicative proceeding shall disclose that the appearance is in a representative capacity and shall conform to the provisions of Rules 3.3(a) through (c), 3.4(a) through (c), and 3.5.

COMMENT:

In representation before bodies such as legislatures, municipal councils, and executive and administrative agencies acting in a rule-making or policy-making capacity, lawyers present facts,

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court. If there is an issue whether the client has committed perjury, the lawyer cannot represent the client in resolution of the issue, and a mistrial may be unavoidable. An unscrupulous client might in this way attempt to produce a series of mistrials and thus escape prosecution. However, a second such encounter could be construed as a deliberate abuse of the right to counsel and as such a waiver of the right to further representation.

Constitutional Requirements

The general rule that an advocate must disclose the existence of perjury with respect to a material fact, even that of a client applies to defense counsel in criminal cases, as well as in other instances. However, the definition of the lawyer's ethical duty in such a situation may be qualified by constitutional provisions have been construed to require that counsel present an accused as a witness if the accused wishes to testify, even if counsel knows the testimony will be false. The obligation of the advocate under these Rules is subordinate to such a constitutional requirement.

Duration of Obligation

A practical time limit on the obligation to rectify the presentation of false evidence has to be established. The conclusion of the proceeding is a reasonably definite point for the termination of the obligation.

Refusing to Offer Proof Believed to be False

Generally speaking, a lawyer has authority to refuse to offer testimony or other proof that the lawyer believes is untrustworthy. Offering such proof may reflect adversely on the lawyer's ability to discriminate in the quality of evidence and thus impair the lawyer's effectiveness as an advocate. In criminal cases, however, a lawyer may, in some jurisdictions, be denied this authority by constitutional requirements governing the right to counsel.

Ex Parte Proceedings

Ordinarily, an advocate has the limited responsibility of presenting one side of the matters that a tribunal should consider in reaching a decision; the conflicting position is expected to be presented by the opposing party. However, in an ex parte proceeding, such as an application for a temporary restraining order, there is no balance of presentation by opposing advocates. The object of an ex parte proceeding is nevertheless to yield a substantially just result. The judge has an affirmative responsibility to accord the absent party just consideration. The lawyer for the represented party has the correlative duty to make disclosures of material facts known to the lawyer and that the lawyer reasonably believes are necessary to an informed decision.

Rule 3.4 - Fairness to Opposing Party and Counsel

A lawyer shall not:

- (a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential

evidentiary value. A lawyer shall not counsel or assist another person to do any such act;

- (b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;
- (c) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists;
- (d) in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party;
- (e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused; or
- (f) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:
- (1) the person is a relative or an employee or other agent of a client; and
 - (2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

COMMENT:

The procedure of the adversary system contemplates that the evidence in a case is to be marshaled competitively by the contending parties. Fair competition in the adversary system is secured by prohibitions against destruction or concealment of evidence, improperly influencing witnesses, obstructive tactics in discovery procedure, and the like.

Documents and other items of evidence are often essential to establish a claim or defense. Subject to evidentiary privileges, the right of an opposing party, including the government, to obtain evidence through discovery or subpoena is an important procedural right. The exercise of that right can be frustrated if relevant material is altered, concealed or destroyed. Applicable law in many jurisdictions makes it an offense to destroy material for purpose of impairing its availability in a pending proceeding or one whose commencement can be foreseen. Falsifying evidence is also generally a criminal offense. Paragraph (a) applies to evidentiary material generally, including computerized information.

With regard to paragraph (b), it is not improper to pay a witness's expenses or to compensate an expert witness on terms permitted by law. The common law rule in most jurisdictions is that it is improper to pay an occurrence witness any fee for testifying and that it is improper to pay an expert witness a contingent fee.

Paragraph (f) permits a lawyer to advise employees of a client to refrain from giving information to another party, for the employees may identify their interests with those of the client. See also Rule 4.2.

- (d) In an *ex parte* proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse.

COMMENT:

The advocate's task is to present the client's case with persuasive force. Performance of that duty while maintaining confidences of the client is qualified by the advocate's duty of candor to the tribunal. However, an advocate does not vouch for the evidence submitted in a cause; the tribunal is responsible for assessing its probative value.

Representations by a Lawyer

An advocate is responsible for pleadings and other documents prepared for litigation, but is usually not required to have personal knowledge of matters asserted therein, for litigation documents ordinarily present assertions by the client, or by someone on the client's behalf, and not assertions by the lawyer. Compare Rule 3.1. However, an assertion purporting to be on the lawyer's own knowledge, as in an affidavit by the lawyer or in a statement in open court, may properly be made only when the lawyer knows the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry. There are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation. The obligation prescribed in Rule 1.2(d) not to counsel a client to commit or assist the client in committing a fraud applies in litigation. Regarding compliance with Rule 1.2(d), see the Comment to that Rule. See also the Comment to Rule 8.4(b).

Misleading Legal Argument

Legal argument based on a knowingly false representation of law constitutes dishonesty toward the tribunal. A lawyer is not required to make a disinterested exposition of the law, but must recognize the existence of pertinent legal authorities. Furthermore, as stated in paragraph (a)(3), an advocate has a duty to disclose directly adverse authority in the controlling jurisdiction which has not been disclosed by the opposing party. The underlying concept is that legal argument is a discussion seeking to determine the legal premises properly applicable to the case.

False Evidence

When evidence that a lawyer knows to be false is provided by a person who is not the client, the lawyer must refuse to offer it regardless of the client's wishes.

When false evidence is offered by the client, however, a conflict may arise between the lawyer's duty to keep the client's revelations confidential and the duty of candor to the court. Upon ascertaining that material evidence is false, the lawyer should seek to persuade the client that the evidence should not be offered or, if it has been offered, that its false character should immediately be disclosed. If the persuasion is ineffective, the lawyer must take reasonable remedial measures.

Except in the defense of a criminal accused, the rule generally recognized is that, if necessary to rectify the situation, an advocate must disclose the existence of the client's deception to the court or to the other party. Such a disclosure can result in grave

consequences to the client, including not only a sense of betrayal but also loss of the case and perhaps a prosecution for perjury. But the alternative is that the lawyer cooperate in deceiving the court, thereby subverting the truth-finding process which the adversary system is designed to implement. See Rule 1.2(d). Furthermore, unless it is clearly understood that the lawyer will act upon the duty to disclose the existence of false evidence, the client can simply reject the lawyer's advice to reveal the false evidence and insist that the lawyer keep silent. Thus the client could in effect coerce the lawyer into being a party to fraud on the court.

Perjury by a Criminal Defendant

Whether an advocate for a criminally accused has the same duty of disclosure has been intensely debated. While it is agreed that the lawyer should seek to persuade the client to refrain from perjurious testimony, there has been dispute concerning the lawyer's duty when that persuasion fails. If the confrontation with the client occurs before trial, the lawyer ordinarily can withdraw. Withdrawal before trial may not be possible, however, either because trial is imminent, or because the confrontation with the client does not take place until the trial itself, or because no other counsel is available.

The most difficult situation, therefore, arises in a criminal case where the accused insists on testifying when the lawyer knows that the testimony is perjurious. The lawyer's effort to rectify the situation can increase the likelihood of the client's being convicted as well as opening the possibility of a prosecution for perjury. On the other hand, if the lawyer does not exercise control over the proof, the lawyer participates, although in a merely passive way, in deception of the court.

Three resolutions of this dilemma have been proposed. One is to permit the accused to testify by a narrative without guidance through the lawyer's questioning. This compromises both contending principles; it exempts the lawyer from the duty to disclose false evidence but subjects the client to an implicit disclosure of information imparted to counsel. Another suggested resolution, of relatively recent origin, is that the advocate be entirely excused from the duty to reveal perjury if the perjury is that of the client. This is a coherent solution but makes the advocate a knowing instrument of perjury.

The other resolution of the dilemma is that the lawyer must reveal the client's perjury if necessary to rectify the situation. A criminal accused has a right to the assistance of an advocate, a right to testify and a right of confidential communication with counsel. However, an accused should not have a right to assistance of counsel in committing perjury. Furthermore, an advocate has an obligation, not only in professional ethics but under the law as well, to avoid implication in the commission of perjury or other falsification of evidence. See Rule 1.2(d).

Remedial Measures

If perjured testimony or false evidence has been offered, the advocate's proper course ordinarily is to remonstrate with the client confidentially. If that fails, the advocate should seek to withdraw if that will remedy the situation. If withdrawal will not remedy the situation or is impossible, the advocate should make disclosure to the court. It is for the court then to determine what should be done—making a statement about the matter to the trier of fact, ordering a mistrial or perhaps nothing. If the false testimony was that of a client, the client may controvert the lawyer's version of their communication when the lawyer discloses the situation to the

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functions undertaken in behalf of the client. For example, if the lawyer is acting as advocate in defending the client against charges of fraud, it would normally be incompatible with that responsibility for the lawyer to perform an evaluation for others concerning the same or a related transaction. Assuming no such impediment is apparent, however, the lawyer should advise the client of the implications of the evaluation, particularly the lawyer's responsibilities to third persons and the duty to disseminate the findings.

Access to and Disclosure of Information

The quality of an evaluation depends on the freedom and extent of the investigation upon which it is based. Ordinarily a lawyer should have whatever latitude of investigation seems necessary as a matter of professional judgment. Under some circumstances, however, the terms of the evaluation may be limited. For example, certain issues or sources may be categorically excluded, or the scope of search may be limited by time constraints or the noncooperation of persons having relevant information. Any such limitations which are material to the evaluation should be described in the report. If after a lawyer has commenced an evaluation, the client refuses to comply with the terms upon which it was understood the evaluation was to have been made, the lawyer's obligations are determined by law, having references to the terms of the client's agreement and the surrounding circumstances.

Financial Auditors' Request for Information

When a question concerning the legal situation of a client arises at the instance of the client's financial auditor and the question is referred to the lawyer, the lawyer's response may be in accordance with procedures recognized in the legal profession. Such a procedure is set forth in the American Bar Association Statement of Policy Regarding Lawyers' Responses to Auditors' Requests for Information, adopted in 1975.

Advocate

Rule 3.1 - Meritorious Claims and Contentions

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceedings as to require that every element of the case be established.

COMMENT:

The advocate has a duty to use legal procedure for the fullest benefit of the client's cause, but also a duty not to abuse legal procedure. The law, both procedural and substantive, establishes the limits within which an advocate may proceed. However, the law is not always clear and never static. Accordingly, in determining

the proper scope of advocacy, account must be taken of the law's ambiguities and potential for change.

The filing of an action or defense or similar action taken for a client is not frivolous merely because the facts have not first been fully substantiated or because the lawyer expects to develop vital evidence only by discovery. Such action is not frivolous even though the lawyer believes that the client's position ultimately will not prevail. The action is frivolous, however, if the client desires to have the action taken primarily for the purpose of harassing or maliciously injuring a person or if the lawyer is unable either to make a good faith argument on the merits of the action taken or to support the action taken by a good faith argument for an extension, modification or reversal of existing law.

Rule 3.2 - Expediting Litigation

A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client.

COMMENT:

Dilatory practices bring the administration of justice into disrepute. Delay should not be indulged merely for the convenience of the advocates, or for the purpose of frustrating an opposing party's attempt to obtain rightful redress or repose. It is not a justification that similar conduct is often tolerated by the bench and the bar. The question is whether a competent lawyer acting in good faith would regard the course of action as having some substantial purpose other than delay. Realizing financial or other benefit from otherwise improper delay in litigation is not a legitimate interest of the client.

Rule 3.3 - Candor Toward the Tribunal

- (a) A lawyer shall not knowingly:
 - (1) make a false statement of material fact or law to a tribunal;
 - (2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client;
 - (3) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or
 - (4) offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures.
- (b) The duties stated in paragraph (a) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.
- (c) A lawyer may refuse to offer evidence that the lawyer reasonably believes is false.

Prosecutorial misconduct.

1 Prosecutors violated Idaho Bar Rules of Professional Conduct 804 a) b) c) d) f) - Misconduct by attempting to and committing criminal acts, engaging in dishonesty, fraud, deceit and misrepresentation, inducing judges to violate ID Rules of Judicial Conduct, and attempting to and violating Idaho Bar Rules of Professional Conduct.

Prosecutorial Misconduct

Prosecutors violated Idaho Bar Rules of Professional Conduct 3.8 d) - Special Responsibilities of A Prosecutor by not timely disclosing all evidence listed under Prosecutorial misconduct in this petition including information negating guilt of offense, witness backgrounds, etc.

Take judicial notice of underlying criminal file including transcripts

Prosecutors violated Idaho Bar Rules of Professional Conduct 4.1 a) i), B - Truthfulness to others, by giving information not in evidence to jury and mistating evidence and testimony during closing statements. See Prosecutorial misconduct this petition.

Take judicial notice of underlying criminal file including transcripts.

Prosecutorial misconduct

Prosecutors violated Idaho Bar Rules of Professional Conduct 3.3 a) 4) - Candor toward the tribunal by offering and/or suborning perjured testimony at trial and/or doing nothing to remedy the situation. See false and perjured testimony sections of this petition. Perjured testimony of Rikki Bobo, Kenneth Wayne Thrift, Norman Bennett, Peter Cooper, Officer Kelly, Virginia Wylene Smeltzer. Take judicial notice of underlying criminal file including transcripts

Prosecutors violated Idaho Bar Rules of Professional Conduct 3.4 a) b) c) d) E) - Fairness to opposing counsel by withholding evidence, concealing documents, counseling witnesses, knowingly disobeying disclosure laws, assisting witnesses in testifying, disclosing highly prejudicial, non-probative prior bad acts of defendant, giving information not in evidence. See prosecutorial misconduct this petition - Take judicial notice of underlying criminal file including transcripts

prosecutor told jurors Barcellas own witnesses
couldn't recognise him and knew nothing about him
during his stay in Idaho. T.p. 1761, L 20 - p 1762, L 1-21
This was a blatant lie on prosecutor's part as
Barcellas witnesses had visited him in jail the
day before they testified. Barcella had weekly
telephone contact with family members and
monthly telephone contact with many of the
other witnesses while living in Idaho for
aprox 9 months prior to B.71 Smith's death.

Prosecutorial misconduct - closing
around defendant's neck. Contending defendant lost
over 120 lb and cut his hair to deceive the
jury and witnesses and inferring that is what
an axe murderer looked like. Defendant never
contended he was anyone but the person
charged with the crime.

Prosecutorial misconduct-closing

their testimony and prosecution used underhanded tactics to say they proffered no testimony when in fact defense was prohibited from such unless opened the door to prior bad acts by judges ruling violating Barcella's ^{5th amendment} right against self-incrimination

57) Tr. 1763, L 11-12 Prosecution states false facts that George Lane and Robert Agrifoglio were cellmates at defendant. Agrifoglio shared a dayroom and George Lane lived in a totally different cell in a totally different living area or pod.

58) Tr. 1785, L 23-p 1787, L 1-3 Prosecutor again says Lane and Agrifoglio got nothing for their testimony. Tr. 1786, L 23-p 1787, L 1-4 Haynes bolsters false testimony of Kenneth Thrift that Thrift and Barcella arrived at Harmony House at 2:00 am despite testimony and police interviews of three states witnesses and another person.

59) Tr. 1785, L 1-22, p 1786, L 1-3 Prosecutor again asserts Lane and Agrifoglio got nothing for their testimony.

60) Tr. 1861, L 28-p 1870, L 1-25 During trial and through out closing statements prosecutor held aloft a 9x12" ~~photo~~ booking photo of defendant from a dismissed case showing defendant with long wet hair hanging down as required by jail officials and with a booking number sign 329